THE HIGH COURT

IN THE MATTER OF AN APPLICATION FOR REGISTRATION OF AN ENDURING POWER OF ATTORNEY OF SCR DATED 1st NOVEMBER 2013

JUDGMENT of Ms. Justice Baker delivered on the 20th day of May, 2015

1. This is a contested application pursuant to s. 10 of the Powers of Attorney Act 1996 to register an enduring power of attorney ("EPA") and the judgment will focus on the question of whether the donor of the power had the capacity to execute the instrument creating the power made by him on the 1st November, 2013.

Facts

2. SCR executed an instrument creating an EPA in the statutory form on the 1st November, 2013 in the presence of his solicitor Anthony F O'Gorman. By the power he appointed his son ER to act as attorney for the purposes of the Powers of Attorney Act 1996, with general authority to act on his behalf. Notice of the execution of the power was required to be, and was, given to his two other children DR and FR.

3. Application was made by the attorney so nominated to register the power on the 17th January, 2014, and notice of objections were received in each case dated the 14th April, 2014 from DR, the eldest daughter of the donor, and from his younger daughter, FR.

4. The objection is made to the registration of the instrument on the grounds that:-

1) The enduring power was not valid

2) That the named attorney is unsuitable to act in that capacity

3) That fraud or undue influence was used to induce the donor to create the power

The objections follow the language in s. 10(3) of the Act.

5. The matter first came on before me on the 21st day of January, 2015 and there was before me on that occasion a long affidavit of objection of DR sworn on the 14th April, 2014, the replying affidavit of ER sworn on the 18th July, 2014, and the affidavit of Anthony O'Gorman solicitor sworn on the 2nd September, 2014. The affidavit grounding the objection deposed to a belief that the donor was at the time of the execution of the instrument suffering from a cognitive incapacity as a result of a dementia or Alzheimer's condition, and various examples of behaviour which were claimed to illustrate this frailty were given. There was exhibited a HSE standard assessment record in which entries by medical and social workers staff who had treated the donor showed a deteriorating cognitive function and in particular there was noted on the 30th August, 2013 that Mr R was suffering from "senile dementia + + +"

6. In the light of the evidence and in the exercising of my jurisdiction under s. 10(2), I directed further enquiry. A further affidavit of Dr Doyle sworn on the 20th April 2015 and a supplemental affidavit of objection was sworn by DR on the 9th January, 2015 and there was also adduced on affidavit of the 19th January, 2015 by NW, a friend of the donor, which dealt primarily with the question of the suitability of the donor.

The Powers of Attorney Act, 1996: the burden of proof

7. The court's power in the determination of an application to register an EPA is one conferred by statute and the court has no inherent jurisdiction to for example make a conditional registration, or vary the effect of an instrument. Counsel for the applicant argues that the burden of proving the instrument is invalid lies with the objectors. Section 10(1) provides as follows:

> *"On an application for registration being made in compliance with section 9 the Registrar of Wards of Court shall, unless subsection (2) applies, register the instrument to which the application relates."*

8. Reliance is placed on the judgement of the Court of Appeal of England and Wales *In the matter of W* [2000] EWCA Civ J1211-1 as authority for this proposition.

9. The English Enduring Powers of Attorney Act 1985 is not identical to s. 6(4) of the Irish Act. The English s. 6(6) provides that:-

> *"If in a case where subsection 4 above applies, any of the grounds of objection in subsection 5 above is established to the satisfaction of the court, the court shall refuse the application but if, in such a case, it is not so satisfied, the court shall register the instrument to which the application relates."*

10. Lady Justice Arden took the view that the subsection *"clearly proceeds on the basis that the grounds of objection have to be proved"*. She went on to say:-

> *"Accordingly, as I see it, the legal burden remains throughout on the objector, the person presenting the notice of objection. If the objector fails to establish his objection, the instrument must be registered. The court has no residual discretion to refuse registration."*

11. The English Act does create a certain statutory presumption of capacity, or certain evidential matters which are squarely placed at the door of the objectors. The Irish Act does not so clearly create a statutory presumption but I consider that in the case of an application to register an EPA no great evidential difficulty arises from the proposition advanced by counsel for the applicant, namely that a document which appears valid on its face will be presumed to be valid, and the instrument should be registered. I consider that that approach is consistent with the scheme of the legislation, which provides a procedure for registration and in the absence of objections and provided due execution is shown, the legislation seems to envisage that registration will occur.

12. I accept counsel's argument that the burden lies on the objector and that the decision must be in favour of registration unless it is established that Mr R lacked capacity to execute the instrument. The legislation permits objection to be raised on a number of identified grounds and s. 10(4) provides that the court may refuse an application on any of these grounds. I accept counsel's point that the objectors must do more than raise a hypothetical or formal ground of objection.

Summary of affidavit evidence on question of capacity
13. The objection to the registration of the power is firstly grounded on an assertion that the instrument is not valid in that the donor did not have at the date of the execution of the power capacity to create an EPA. It is asserted in particular that the donor suffered from senile dementia and that his condition was such that he did not understand the nature and import of the document executed by him.

14. The application for registration in accordance with the statutory requirement was accompanied by a certificate of Dr. Gormely which states:

> "He is suffering from dementia. It is my opinion that the Enduring Power of Attorney should be registered by reason of Mr. Rawson's mental incapacity in relation to all his affairs."

Mr R was admitted to a nursing home on the 22nd October, 2013 and he has the benefit of the Fair Deal Scheme operated by the State from which is derived the bulk of the cost of the nursing home.

15. Counsel accept, as they must, that the appropriate date of assessing whether Mr R had the capacity to execute the EPA is the date of execution namely 1st November, 2013. The instrument was executed in the nursing home where Mr R continues to reside, and in the presence of his solicitor Anthony O'Gorman whose affidavit evidence is that he attended at the nursing home accompanied by his secretary. The donee of the power ER was present as was the donor's friend NW. Mr O'Gorman in his affidavit states that he found Mr R to be "in good enough condition to discuss his requirements with me in rational manner". He said that he explained to Mr R the "concept and meaning" of an EPA and that "it was for his benefit so that his son, E, who had agreed to act as his attorney, and who "looked after his affairs in any event, would be in a position to discharge his accounts which would be for his benefit and his benefit alone". Mr O'Gorman says that after this discussion the donor "made it quite clear that he wanted whatever was to be dealt with, dealt with now".

16. It seems that in the presence of Mr O'Gorman the donor made contact with the eldest daughter DR and Mr O'Gorman says that he could overhear the phone conversation and that he had "no doubt that DR fully understood" what her father was saying and that she was "very positive" that such an instrument be executed. The other child of the donor was not contactable by phone on that day.

17. Mr O'Gorman concludes his affidavit evidence by saying that Mr R after this conversation executed the necessary documents "and was happy to do so".

18. ER, the donee of the power confirmed the events in the nursing home on that day and the conversation with his sister D, as did NW in her affidavit.

The medical evidence
19. The notice parties in their first affidavit exhibited a HSE record form showing considerable evidence of cognitive incapacity over a period of two year prior to registration. The affidavit of Dr. Damien Doyle showed that he had acted as GP for Mr R for the past 13 years and that he had witnessed Mr R "change from an independent person capable of independent living to a person dependent on help of nurses and staff at his nursing home". He gave no indication of the timeframe of this change of capacity, and of the precise condition in which Mr R was on that date he executed the power. He did say that Mr R first displayed signs of dementia in and around the 1st December, 2011 and that his "condition deteriorated over time" to the extent that he was required to move to a supported living arrangements in the nursing home.

20. The exhibits to Dr Doyle's affidavits showed that he scored 23 out of 30 on a mini mental health test on the 30th August, 2013 and this score is explained as suggestive of a "moderate dementia". Dr Doyle did say that "someone with this score is capable of understanding", but with regard Mr R merely that he was "capable of basic understanding of matters at that time".

21. Dr Doyle executed the statutory part of the instrument creating the power on the 6th November, 2013, five days after it was executed by the donor. The standard form provides as follows:

> *"that in his or her opinion at the time the document was executed that the donor had the mental capacity, with the assistance of such explanations as may have been given to the donor, to understand the effect of creating the power."*

It is now apparent that Dr Doyle did not examine or specifically assess the donor for the purposes of executing this certificate.

22. Dr Doyle's second affidavit points to the fact that senile dementia is a medical diagnosis, and not a specific disease but rather

> "an overall term that describes a wide range of symptoms associated with a decline in memory or other thanking skills severe enough to reduce a person's ability to perform everyday activities".

He explains that dementia is diagnosed on the basis of a medical history, a physical examination and that the condition presents in various forms, some of which have similar or overlapping symptoms, and some of which cannot be diagnosed without a brain biopsy, a test which is not always indicated as necessary.

23. Dr Doyle points to the fact that his observation of Mr R suggested that he was displaying the characteristics of dementia including forgetfulness, a tendency to wander, confusion and agitation. He said however that Mr R at times presented with few symptoms and that he had "times of lucidity" during which he was "capable of acute understanding of issues including his health".

Chronology of Events
24. I find the following relevant dates from the affidavit evidence and in particular from the HSE records.

> 1) The donor first displayed signs of dementia on the 1st December, 2011, as noted by Dr. Doyle.
>
> 2) In February 2012 a Dr. O'Driscoll, a specialist in geriatric medicine, noted in a standard HSE assessment form that the donor had scored 23/30 in a mini mental state test ("MMS test"). This date is incorrectly given by Dr Doyle in his first affidavit of the 20th March, 2015 as arising from a test conducted on the 30th August, 2013. The result is consistent with what is described by Dr Doyle as "moderate" dementia.
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> 3) A public health nurse Maureen Lawrence noted on the 2nd May, 2013 that the donor was at a high risk of wandering.

4) On the 13th June, 2013 Ms Lawrence noted that the donor could not retain information, that he was at a very high risk of wandering and he had been found on the road on a number of occasions in his dressing gown and in poor weather conditions. An observational test was carried out by Ms Lawrence called a Barthel Index Test, described as a test for assessing self care and mobility activities, in which the donor scored 13/20. Ms Lawrence noted that he attended a day care centre run by the Alzheimer's Society and was in need of a "high level of supervision".

5) Dr Doyle diagnosed Mr R with "senile dementia +++" on the 30th August, 2013,a diagnosis made from clinical observations. Dr. Doyle notes the he "was not at the worst stages of dementia" at the time. He was prescribed a specific drug for dementia, thought to treat some of the symptoms of Alzheimer's disease although not believed to halt or reverse the process of cell damage that causes the disease.

6) On the 10th September, 2013 Dr Doyle found Mr R to be lucid and displaying no sign of confusion, forgetfulness or agitation and capable of understanding and discussing his health issues in a comprehensive manner

7) On the 19th September, 2013 Michael Kelly, a senior occupational therapist noted that the donor scored 19/30 in an MMS test and 0 on the orientation to time and recall test. The precise meaning of this result was not explained but it is a lower result than the one carried out a year and a half earlier.

8) On the last occasion that he was seen by Dr Doyle, the 8th October, 2013 Mr R displayed signs of confusion and agitation.

9) On the 22nd October, 2013 on medical advice the donor took up permanent residence in a nursing home. The evidence points to a serious deterioration at that stage which required his admission as a matter of urgency.

10) Ten days later on the 1st November, 2013 the instrument creating the EPA was executed.

11) On the 21st January, 2014 notice of intention to apply for registration of the EPA was lodged, and a doctor's letter confirmed a lack of cognitive capacity in respect of all his affairs.

25. Thus the last occasion on which Dr Doyle examined the donor and found him to be capable of executing the power of attorney was on the 10th September, 2013 some seven weeks before the instrument creating the EPA was executed. A month later, on the 8th October, 2013, Mr R did not have the capacity and displayed signs of confusion and agitation.

Conclusion on evidence
26. I come to the following conclusion with regard to the medical evidence: Mr R was suffering from dementia and his condition became progressively worse from the time he first displayed symptoms in December 2011. He had a clear diagnosis of moderate to severe dementia on the 30th August, 2013. He was lucid on the 10th September, 2013, and confused and incapable of understanding on the 8th October, 2013. I accept that a person with senile dementia has a progressive condition, and that within the progression there may be periods of lucidity. At the time Mr R executed the instrument he had already been admitted into a nursing home due to his inability to care for his everyday needs. I note the suggestion that one reason for this was that he had a tendency to wander, but I regard the medical evidence as pointing me to the fact that the tendency to wander is an intrinsic element in the condition of senile dementia, and one which is suggestive of a broader spectrum of incapacity.

The purpose of certification
27. It is quite apparent that Dr Doyle executed the statutory certificate on the 6th November, 2013 without having examined Mr R, and indeed in circumstances where the last consultation he had with Mr R would suggest a lack of cognitive capacity. Dr Doyle explains his certification as arising from a reliance on information given to him by Mr O'Gorman that Mr R was lucid on the afternoon when he signed the instrument creating the EPA. Dr Doyle suggests that a person without a medical background would be aware, and I assume capable of testing, whether confusion was present. The affidavit of ER says that the instrument was sent after execution to Dr Doyle for him to add the certificate. Mr O'Gorman does not say he spoke to Dr Doyle, and Dr Doyle does not directly confirm this fact.

28. The purpose of the statutory certification is manifold, but primarily its purposes must be to protect the donor of a power of attorney, and if necessary to provide contemporary evidence of the state of mind of a person who executed the instrument. The statutory creation of an EPA was put in place after a long consultation process including a report by the Law Reform Commission, in the context of its review of Land Law and Conveyancing Law – LRC 31/1989, and the first and second schedules to the Enduring Powers of Attorney Regulations, S.I. 196 of 1996 contain the form of the instrument. As part of the execution of an EPA a solicitor is required to certify that the donor understood the effect of the execution and that the solicitor is satisfied that there is no reason to believe that the document is being executed by the donor as a result of fraud and undue pressure. A registered medical practitioner must also certify capacity.

29. I consider that the legislation did not envisage circumstances where a doctor would rely on the opinion of a solicitor with regard to capacity, especially so in the case of a person who was suffering from a progressive dementia condition, as was Mr R. While the legislation imposes no time limits on the execution of a certificate, and does not require the certificate to be contemporaneous, the fact that medical certification is mandated requires an independent medical assessment as to the capacity of the donor to execute the document, and the responsibility for the certification cannot depend on the opinion on another non-medical person. To consider otherwise would suggest that in a suitable case no medical evidence was in fact required.

Best practice?
30. The Law Society Guidelines 2004, in respect of the legislation, at para. 1.04 suggest that the statement of capacity of the medical practitioner and the certificate of the solicitor "should ideally be completed within 30 days of the signing" of the instrument and that solicitors should keep an attendance note demonstrating the client's understanding when a client is elderly or incapable to protect the donor and to inform the court.

31. I consider that Mr O'Gorman did not follow the "best practice" guidelines published by the Law Society and turn now to the question of the extent to which guidance ought to be sought from these. The operation of the rules of "best practice" or a "golden rule" were considered by Briggs J. *In re Key* (deceased) [2010] EWHC 408 (Ch):-

> *"The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings …"*

However, Briggs J. went on to say at p. 2023:-

> *"Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope."*

32. I am satisfied in this case that best practice was not followed by either the legal or the medical practitioners who certified capacity on the 6th November, 2013, and that is not because of the gap of five days which occurred between the execution of the EPA by the donor and the date of that certificate, but rather because the evidence quite clearly points to a conclusion that Mr R had at best a progressive condition which was capable of causing, and was in fact causing, him to be confused and disorientated. It would most certainly have been preferable had the certificate of the doctor been based on an assessment carried out by him closer to the time of the execution of the EPA, and while a gap of three or four weeks might appear short, the evidence is that three weeks before the execution of the EPA the donor presented as confused and disorientated.

33. Having regard to the fact that the condition as explained by Dr Doyle is a progressive condition, and notwithstanding that a person suffering from the condition is capable of periods of lucidity, establishing that a period of lucidity was in fact operative at the time of the execution of the instrument must be one which, from a medical point of view, requires contemporary or near contemporary examination. The matter could be stated to some extent in the negative, if a person is showing few or no signs of confusion, then it might be fair to say that a gap of five days between the execution of the instrument and the certification of a doctor, would not raise a doubt, but where the opposite is the case, and where signs of confusion are shown and, where, as here, the condition is progressive, and not one from which a person recovers or where the mental state of a suffer improves over time, the certificate ought to be based on an assessment of capacity at the time of execution and cannot be a matter to be extrapolated from the observations of a person without medical knowledge.

34. In conclusion, I consider that in the case of a power of attorney executed by a person who has fluctuating or deteriorating mental capacity simultaneous or near simultaneous medical assessment is desirable, and this is so because the fluctuating nature of the condition itself opens the possibility that the mental capacity of the donor be impaired. This is not to say that simultaneous legal and medical assessments are always required, and whether this is so will depend on the circumstances of the individual donor.

35. It is noteworthy in this case that neither the doctor nor the solicitor who certified capacity on the instrument executed by Mr. R adduced contemporaneous notes at the hearing. Dr. Doyle has suffered a fire at his surgery, but even allowing for this fact, he does not state in his affidavit that he did prepare contemporaneous notes, and it is clear from his evidence that he did not clinically examine Mr. R before preparing the certificate. At best he relied on a conversation with Mr. O'Gorman. Mr. O'Gorman has sworn an affidavit and did not exhibit any contemporaneous notes. I regard this less than satisfactory and I would expect at the very minimum a solicitor and a doctor who have a statutory obligation to certify capacity for the purposes of the creation of an EPA should record their findings and make these available if necessary to a court charged with determining the question of mental capacity in any further dispute

36. I consider that, while best practice or professional guidelines are useful tools, they can do no more than act as a marker and the question of capacity must be determined as a matter of fact in the circumstance of the individual case. Laffoy J. in *Scally v. Rhatigan* [2010] IEHC 475 that:-

> *"Irrespective of whether the "Golden Rule" or best practice was followed in a particular case, it is a question of fact, which is to be determined having regard to all of the evidence and by applying the evidential standard of the balance of probabilities… "*

The test: legal or medical?

37. Notwithstanding this it seems to me I must consider the question, not previously dealt with by any decision opened to me whether the test of capacity is a medical or legal test.

38. Counsel for the applicant argues that the test is a mixed test of law and fact and points me to the general approach of the court with regard to capacity to execute a testamentary document and suggests that some assistance can be gained from the case law.

39. Before I turn to the case law on capacity to execute a testamentary document I wish to briefly refer to the legal test of capacity as explained by the Supreme Court in *In re Ward of Court (withholding medical treatment) No. 2* [1996] 2 I.R. 79. An adult is presumed to have capacity and whether a person has capacity to execute an instrument requires an understanding of the nature, purpose and effect of an instrument executed by him or her. For that purpose I adopt the detailed analysis of Laffoy J. in *Fitzpatrick v. F.K.* [2008] IEHC 104 that the true test is whether a person's *"cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect"* of a choice, in that case of life saving treatment proffered. Laffoy J. linked the question of capacity to the capacity to understand information, understand the consequences of an action, of a choice made and to be in a position to weigh information an alternative choices and likely outcomes. That characterisation is a useful tool to start the analysis.

40. Some assistance can also be obtained from the law on testamentary capacity and the classic statement of testamentary capacity is found in the old decision of *Banks v. Goodfellow* [1870] LR 5QB 549, where Cockburn C.J. considered the capacity to make a will and made the following statement, much quoted:-

> *"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."*

41. The test has been followed in a number of cases in Ireland, by the Supreme Court *In re Glynn (deceased)* [1990] 2 I.R. 326, and by Kelly J. in *O'Donnell v. O'Donnell* (Unreported, High Court, 24th March, 1990) where he admitted a will to proof notwithstanding that the testator suffered from paranoid schizophrenia, having taken the view on the evidence that the condition was stable at the time the will was made and taking the general view that if a person is suffering from an illness in which he had been shown to have lucid intervals, that a will can be made provided the lucidity and clarity of mind is shown.

42. More recently Laffoy J. in *Scally v. Rhatigan* had followed the test. The testator in that case had made a long and complex testamentary document. I adopt by analogy the test of capacity stated by Laffoy J. in that case as follows:-

> *"I am satisfied that I must decide, on the basis of the entirety of the evidence, whether, on the balance of probabilities, the deceased had testamentary capacity by reference to the Banks v. Goodfellow test on 19th May, 2005."*

43. I consider then that the question of cognitive capacity requires the court to make a legal assessment of such capacity and that the court ought not in the case of the execution of an instrument creating an EPA defer to a medical assessment, even one made following a contemporaneous or near contemporaneous assessment. I reject the argument of counsel for the applicant in this regard and prefer the approach that is clear in the case of testamentary capacity.

Functional test of capacity
44. Counsel for the objectors contends that assistance can be gleaned from the case law of England and Wales and that I should apply what is described as "a functional test", namely whether the impairment or disturbance in the functioning of the mind or brain had the effect that the donor was unable to make a decision for himself in relation to the matter in question. The Law Reform Commission has recommended a statutory functional test in Ireland and an Assisted Decision-Making (Capacity) Bill 2013 is before the Oireachtas, but the functional test or the test as urged on me by counsel for the objectors in line with the case law of England and Wales cannot inform my decision.

45. I accept however his general argument that capacity must be tested having regard to the function being undertaken, and at the time of the execution of the instrument. This is consistent with the test of capacity explained in Fitzpatrick v F.K. Thus, the court will as a broad range of questions in order to asses the capacity of a donor to execute an instrument creating an EPA. There can be circumstances where a person is at the time of the execution of an instrument incapable of managing his or her property and affairs if they are very complex, but capable of understanding the need or desirability to give authority to another person to so manage those affairs, and to choose that person. This is not to say that the creation of an EPA is a simple task, as some complexity is undoubtedly found in the range of the powers and duties imposed on an attorney after a power is registered, but I consider that there are probably many examples where a person understands and appreciates that he or she is suffering from a progressive dementia type condition likely to lead to circumstances where the management of financial affairs is beyond his or her capacity, and may even have come to a position where he or she is unable to actually manage or direct complex financial affairs, but is still in a position to understand and give instructions for the appointment of another person to act on his or her behalf. The cognitive capacity has to be at a level sufficient to understand the effect of giving decision-making authority to another.

The effect of section 4(3)
46. Counsel for the applicant argues that s. 4(3) creates a presumption of capacity. Section 4(3) provides:-

> *"If any question arises under this Part as to what the donor of the enduring power might at any time be expected to do it shall be assumed that the donor had the mental capacity to do so."*

47. Mental incapacity is defined in s. 4 as follows:-

> *"incapacity by reason of a mental condition to manage and administer his or her own property and affairs and cognate expressions shall be construed accordingly".*

48. Section 4(3) must in my view be construed as linked to the particular purposes of s. 6(4) where the phrase "might be expected to do" is found. This section deals with the scope of the authority of an attorney under an enduring power. Section 6(4) provides as follows:-

> *"Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may act under the power for the attorney's benefit or that of other persons to the following extent but no further, that is to say, the attorney—*
>
> > *(a) may so act in relation to himself or herself or in relation to any other person if the donor might be expected to provide for his or her or that person's needs respectively; and*
> >
> > *(b) may do whatever the donor might be expected to do to meet those needs."*

48. I do not consider that s. 4(3) informs the question of whether a donor had a power to execute a power of attorney, but rather places the attorney in the shoes of a donor as if the donor had full cognitive capacity.

Conclusion on the test of capacity
49. Thus I regard the question to be determined to be whether, on the balance of probabilities and taking the evidence as a whole, the donor had sufficient cognitive capacity as a matter of fact to understand the nature and effect of the instrument he actually purported to execute. The test is a legal test. I am satisfied that notwithstanding that there exists a presumption that an instrument in the statutory form creates a valid EPA, once a valid objection is shown the court must determine the question, not on the basis of any artificial evidential test but rather on the entirety of the facts before it. I consider that the objectors have raised a valid objection and turn now to consider the elements of cognitive capacity.

Understanding the effect of the power: what is required?
50. An EPA is one which will of course by its statutory nature become operative once the donor becomes mentally incapable. The donor should at the minimum understand and be capable of understanding the following:-

51. The range of matters in respect of which the donee would have authority to act on his behalf.

52. That the power once registered could only be revoked by order of the court.

53. The limited power of the notice parties to object to decisions taken by the donee after registration.

54. That the authority of his chosen attorney will be to act on his behalf should he become mentally incapable.

55. That, subject to any limitations placed in the instrument itself, the donee of the power will be able to do anything with the donor's property which the donor himself or herself could have done.

56. With this in mind it must be noted that the law as it presently stands does not involve an automatic supervision by the High Court of the exercise by the donee of an enduring power of his or her authority. There is for example no requirement that annual accounts be filed in the High Court. Furthermore as explained in *A.A & Ors. v. F.F.* [2015] IEHC 142 the donee of a power is not answerable to other family members in the performance of his or her functions.

What was to be understood by Mr R?
57. I have outlined above the various elements of the test which ought to be applied to Mr R's cognitive capacity at the time he executed the instrument creating the EPA. For brevity I will use the expression "nature and effect" in referring to these elements of the test and I turn now to consider the evidence before me as to what explanation and assistance was offered to Mr R at the date he executed the document, and whether that evidence establishes that he had capacity.

58. Anthony O'Gorman his solicitor swore one affidavit in the application. He says that he attended at the nursing home and took instructions from Mr R and that he explained the "concept and meaning" of the EPA. The balance of para. 7 of his affidavit bears quoting in full:-

> "[T]he concept and meaning of same [the EPA] was explained to him and it was for his benefit so that his son, E, who had agreed to act as his Attorney and who looked after his affairs in any event, would be in a position to discharge his accounts which would be for his benefit and his benefit alone."

59. Mr O'Gorman then goes on to say that Mr R was clear that he wanted to execute the instrument there and then, and that he had sought to speak to his two daughters to get their opinion. He managed to talk to only one of his daughters, DR, who in her affidavit said she found her father to sound stressed and that his speech was somewhat slurred. The other person present who has sworn an affidavit was NW, a close friend of the donor who continues to frequently visit him in the nursing home. She explains the events as follows:-

> *"I recall Mr O'Gorman explaining the significance and importance of the Enduring Power of Attorney."*

She goes on to say that she was satisfied that the donor "understood what he was signing".

60. The best evidence I have of Mr R's capacity to understand has to be the events that occurred in the nursing home on the day the instrument was executed by him. I have no medical evidence from that date, and, as I have already expressed, I am unhappy with the medical evidence as adduced by Dr Doyle for the reasons stated. I note in particular that Mr O'Gorman the solicitor does not exhibit any memorandum of his attendance on the donor on the date in question, and having regard to the importance of the document which was effected, the fact that the donor was in a nursing home and was placed there because of his inability to manage his day to day affairs, the fact that it ought to have been known to Mr O'Gorman that the donor was suffering from senile dementia and/or Alzheimer's disease, and that his admission to the nursing home was mandated as a matter of urgency following a review by the HSE. I am concerned that Mr O'Gorman has not in his affidavit deposed to the nature of the explanation that he gave to Mr R, save to say that it was "for his benefit" so that his son would be "in a position to discharge his accounts". The EPA as executed does far more than this, and it gives a general power to manage all of the financial and property affairs of the donor with no express limitations. I am not satisfied that Mr O'Gorman explained this to the donor with a sufficient degree of clarity to satisfy me that the explanation was complete. While it might broadly speaking be correct to say that an instrument creating an EPA is for the "benefit" of the donor, the instrument actually executed by Mr. R creates a power of far reaching effect.

61. ER, the proposed attorney in his affidavit sworn on the 18th July, 2014 says that he was present during the visit and that he knew that his father understood the contents of the instrument that he executed "by virtue of the relevant questions that he asked about the matter". He does not identify these questions, or explain the elements of the authority that was proposed to be given to him. In his affidavit he placed particular emphasis on what he described as "the situation about the payments due to the nursing home" and I note that the theme of how these payments were to be met runs through the evidence. This is understandable having regard to the fact that while the donor had the benefit of the Fair Deal Scheme, some shortfall has been identified in the payments. ER at para. 13 of his affidavit makes the following point:-

> "my father had a genuine fear that if he did not pay the Nursing Home that he would lose his place or it would be put at risk."

He goes on to say that he and his father "were genuinely" concerned about these payments.

62. I take the view having regard to this evidence that the purpose for which the power of attorney was proposed to be executed by Mr R, and the purpose which formed the basis of the explanation to him, was to deal with the balance of the costs due to the nursing home, and that the perceived urgency in having the EPA executed was to deal with this specific need. I am satisfied that this particular context was explained to Mr R on the day that he executed the instrument, but I am not satisfied on the evidence that the import of the EPA which gave a general power to the attorney over all of his financial affairs and property was explained to or understood by him.

Conclusion
63. I am satisfied on the evidence that Mr R did not have cognitive capacity at the date he executed the instrument creating the EPA. I come to this conclusion on the whole of the evidence before me. The court in the exercise of its statutory power may refuse the application to register on any of the grounds identified in s. 10(3) one ground being that the power purported to have been created is not valid. While I accept that there is a presumption at law that a person has legal capacity, that presumption is rebuttable. I am satisfied that Mr R was suffering from moderate dementia which impaired his cognitive functions. I am not satisfied that the evidence as a whole shows that he was sufficiently lucid at the time he executed the instrument to understand its nature as a general power, nor am I satisfied that the scope and purpose of the power was fully explained to him or understood by him. In the circumstances the objection to registration is sustained and in the exercise of my statutory power I refuse to order that it be registered.

64. As the question is determinative I do not propose to consider the other ground of objection, that the donee of the power is not suitable to act as attorney.