

## THE HIGH COURT

## IN THE MATTER OF THE POWERS OF ATTORNEY ACT 1996

## AND IN THE MATTER OF AN INSTRUMENT CREATING AN ENDURING POWER OF ATTORNEY EXECUTED BY N.B. ON 7TH FEBRUARY, 2014

BETWEEN

G.B. AND M.B.

APPLICANTS

AND

H.B.

RESPONDENT

## JUDGMENT of Mr. Justice Barr delivered on the 8th day of November, 2016

**Introduction**

1. On 7th February, 2014, one N.B. (hereinafter "*the donor*"), executed an Enduring Power of Attorney whereby she appointed her son, H.B., as her attorney (hereinafter referred to as "*the attorney*"). Her remaining two children were named as the notice parties required under the Powers of Attorney Act 1996.

2. On 16th March, 2016, the attorney gave notice of his intention to register the Enduring Power of Attorney (hereinafter "*the EPA*").

3. The applicants (hereinafter "*the notice parties*") issued a Notice of Objection to the registration of the EPA. In this application, they seek an order pursuant to s. 10 of the Powers of Attorney Act 1996 that the court should refuse to register the EPA on the following grounds:-

(i) that having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney; and

(ii) that undue pressure was used to induce the donor to execute the Power of Attorney.

4. In these circumstances, it is necessary for the court to set out the background to the creation of the EPA and to set out some background to the strained relationship between the attorney and the notice parties.

**The Alleged Unsuitability of the Attorney**

5. In relation to the first ground that the attorney is an unsuitable person to act as the donor's attorney under the EPA, the notice parties stated that they were not making the case that the attorney was unsuitable in a general sense, such that he was dishonest or incapable of managing his mother's affairs, but that having regard to all the circumstances which existed within the family and in particular, having regard to what the notice parties alleged was the breakdown in relationships among the donor's children, that in these circumstances the attorney was unsuitable to take on that role.

6. The notice parties make the case that there has been a fundamental breakdown in the relationship between the attorney and them. They state that this came about in the following way: the donor's husband died in December 2013. The donor was aged 88 years at that time. She was in poor physical health, having suffered from polio as a young woman, resulting in paralysis in her left arm and left leg. This caused her significant mobility difficulties. At that time, she resided in the house in which she had lived with her husband in Co. Dublin. This was a large five bed-roomed house, with a swimming pool in the grounds.

7. A meeting was arranged for Sunday, 12th January, 2014, between the donor and her children, to discuss her living arrangements in the wake of her husband's death. This meeting turned out to be quite acrimonious and it seems to represent the start of what the notice parties regard as the unsuitable conduct on the part of the attorney.

8. In her affidavit, the second named notice party stated that on the Friday prior to the meeting, she had been advised by a cousin, that when her cousin had called to her mother's house on the previous day, she had found the donor extremely distressed. The donor apparently stated that the attorney had told her that the notice parties were planning to put the donor into a nursing home. The notice parties were understandably upset by this, as they state that they had never made any such comments to the donor, nor had any such plans. The second named notice party recounted that, as the meeting was concluding, the first named notice party asked why lies had been told about the notice parties, when the attorney had told the donor that the notice parties were going to sell the house and put her into a home. The attorney stated that their cousin had taken things up wrongly. However, the second named notice party's recollection was that her cousin had been adamant that that was what had been said by the attorney.

9. The second named notice party stated that an argument then arose between herself, G.B. and H.B. concerning his conduct in the past, particularly concerning his performance as executor of his late aunt's Will and concerning his role as accountant for a company in which the first named notice party was a member and director.

10. The second named notice party stated that there had been an inordinate delay in obtaining a grant of probate to their aunt's estate. She stated that at one stage she had contacted the Institute of Chartered Accountants to inquire as to whether she could make a complaint about H.B. for failing to carry out his duties in relation to administering the estate. However, she did not go ahead with the complaint. She stated that she and the other beneficiaries had been very frustrated that it had taken so long for the estate to be administered. She stated that her relationship with H.B. deteriorated and probably became worse after her father died and it transpired that she had been appointed as executor under her late father's Will. Her brother, H.B., had looked after her late father's financial affairs and may have expected that he would have been named as executor in the Will.

11. The second area of contention at this meeting concerned work that the attorney had carried out for a company in which the first named notice party, G.B., was a member and director. In his affidavit, G.B., stated that the attorney had been engaged as an accountant for the company. As a result of his brother's alleged failure to carry out his duties properly, he stated that it was necessary for the company to appoint other accountants and during the handover of files, it was necessary for the group to report

his brother to the Institute of Chartered Accountants in Ireland. He exhibited a letter from the chairman of the board of directors dated 26th July, 2016, in which the chairman was highly critical of the manner in which the attorney had carried out his duties as accountant to the company. According to M.B., the relationship between her brothers had been poor since the time that H.B. had ceased working with the company.

12. It appears that this meeting ended on a somewhat acrimonious note, without any resolution of the issue as to what care would be put in place for the donor. It is only proper to point out that the attorney, while agreeing that the meeting was somewhat acrimonious, has denied that any of the allegations of improper conduct made against him, either in relation to his administration of the estate of his deceased aunt, or in relation to the work which he carried out for the hardware company were accurate. His version of these events will be set out later in the judgment.

13. On the following day, 13th January, 2014, the attorney attended at the offices of O'Hare O'Dwyer, Solicitors, in Sutton, Co. Dublin. There he spoke with Mr. Michael O'Dwyer and informed him that the donor wished to create a general power of attorney, but was unable to attend at the firm's offices due to physical disability. Two days later, on 15th January, 2014, the solicitor attended with the donor at her house and she executed a general power of attorney. I will return to the execution of this document later in the judgment, but for now it is simply necessary to note that it was executed on that date.

14. On 22nd January, 2014, the second named notice party, M.B., and her husband, went to the donor's house with the sum of €1,000 in cash, which they intended to give to the donor as part of the upkeep and maintenance costs in respect of the donor's property at Rath in Co. Kerry, which they had used on a frequent basis as a holiday home. M.B. stated that when she got to the house, she was unable to gain access to the kitchen, where she could hear that the T.V. was on and although she knocked and shouted, she received no reply. She stated that she was concerned that her mother may have had an accident, so she went around to the front door, knocked on the kitchen window and rang the doorbell twice. However, there was no answer. She stated that she did not know what to do. At that time her brother, H.B., arrived and proceeded to open the porch and front door for her. She stated that her husband told H.B. that he had come to pay the expenses for the property in Kerry. M.B. took her coat off and went to go to the kitchen, but she alleged that H.B. slammed the door in her face. M.B. stated that she told her husband that there was no point in going to see her mother and she then went out and sat in the car. Her husband went into the kitchen where her mother was crying and when he asked H.B. why he had shut the door in M.B.'s face, he said it was to see if the donor wanted to see M.B.

15. M.B.'s husband stated that he had brought the money for the house in Kerry to which the donor allegedly said that the house in Kerry was no use to her anymore as she was not able to go there. H.B. and the donor apparently said that they had no money and that it would be necessary to sell the property at Rath. According to M.B., her husband again tried to give them the money but they refused it. Her husband then left the house and they returned home. M.B. stated that her mother never made any contact with her from that day onwards. M.B. stated that she rang the house twice, but that the phone went straight to the answering machine. She stated that she felt that there was no point in writing a letter as, the post-box was on the side passage door and it would have been difficult for her mother to get down the two steps to check it. Again, H.B. has a somewhat different account of this meeting, which will be set out later in the judgment.

16. On 7th February, 2014, the donor executed the E.P.A. The events leading up to the creation of this document and the execution thereof are dealt with in the affidavits filed by H.B. and the solicitor, Mr. Michael O'Dwyer. These will be dealt with later in the judgment.

17. On 18th February, 2014, the locks were changed on the donor's house. Again, this was dealt with in the evidence of H.B. and will be outlined later in the judgment.

18. Another incident occurred on 24th February, 2014, when the first named notice party, G.B., returned to the house to visit his mother. He stated that due to the fact that the locks had been changed, he was not able to gain entry to the donor's house. He stated that eventually the gardener let both G.B. and his wife into the house. G.B. further stated that he had hardly had a chance to speak to his mother, when his brother, H.B., came storming in and told G.B. to get out. G.B. stated that his wife asked H.B. why they had to leave the property to which he replied "*because G. slammed the door*".

19. According to G.B. an argument ensued during which the attorney decided to call 999 and claimed that he was being attacked by G.B. G.B. totally refuted this assertion in his affidavit. He stated that while he did approach H.B. in anger, at no time would he have assaulted him, as that was not how he would ever deal with such matters. He stated that H.B. rang the gardaí on, at least, three occasions and he stood at the gate waiting for them, ringing them again and asking where they were. He intimated to the gardaí that he was in danger while G.B. stated that he and his wife were sitting outside on the garden wall.

20. G.B. stated that this whole episode was upsetting for both him and for his wife, who had recently lost her own mother. He stated that H.B.'s wife then arrived and shouted something at him. The gardaí arrived and entered the house and interviewed the donor. H.B.'s wife shut the front door on G.B. and his wife while the gardaí were inside the house. G.B. stated that after a while the gardaí interviewed him and his wife and informed them that he would have to make an appointment to see his mother from then on.

21. G.B. stated that he was very upset by this incident. He absolutely refuted that he would ever pose a threat to his mother, whom he loved dearly. He stated that he had never had to make an appointment to see either of his parents in his life until this time and was extremely hurt to be told this. G.B. stated that the day that the gardaí were called caused so much distress to him that he and his wife felt unable to return to the donor's house from then on. He stated that while that could be construed as if they did not care for the donor, that could not be further from the truth. At about that time, he wrote to the Public Health Nurse outlining his concerns about H.B. having sole responsibility for his mother.

22. Thus, leaving aside the rights and wrongs of the various incidents that had taken place during January and February 2014, it would appear that the notice parties had no further dealings with the donor after that time.

23. One of the main complaints made by the notice parties is that after these incidents in January and February 2014, they were not kept informed by the attorney as to their mother's health. In particular, it appeared that the donor's health deteriorated sharply in August 2015. In November 2015, it appeared that the donor had suffered a minor stroke requiring her admission to James Connolly Memorial Hospital. The notice parties complained bitterly that the attorney did not keep them informed of this development. The second named notice party only learnt that her mother had been hospitalised, when she bumped into a neighbour of her mother's, who informed her of this development. They stated that they felt excluded from the decisions which had been taken regarding the donor's care at that time.

24. Earlier, in July 2015, the donor had sold a property that she and her husband had owned in Co. Kerry. The second named notice

party stated that she and her husband had used that property as a holiday home for a number of years. She stated that she had contributed money to help with the maintenance costs for the property. She had expected that in due course, the property would be left to her and her husband. Instead, the property was sold and she was not consulted by the donor, or the attorney, on this decision.

25. The second named notice party, stated that on one occasion she did try to phone her mother, however, she stated that her call went straight through to the answering machine.

26. In his affidavit, G.B. stated that the relationship between him and his brother had not been good for some time. He stated that this arose out of what he alleged was the negligent manner in which the attorney had carried out his duties as executor of his aunt's estate. He also stated that the attorney had not carried out his duties as accountant to a company known as Expert Hardware Limited of which he was a member and director. As already noted, he exhibited to his affidavit, a letter dated 28th July, 2016, written by the chairman of the board of directors, outlining how they had been dissatisfied with the services provided by the attorney. G.B. stated that he had made a complaint about the attorney to the Institute of Chartered Accountants in Ireland. He further stated that the attorney had also been his accountant in 2012/2013, but stopped doing his accounts and ignored any correspondence from him or from his new accountant, which caused both him and his father, who was engaged in the business with him, a huge amount of stress and difficulty at that time.

27. Counsel for the notice parties, Mr. McParland, B.L., submitted that in light of the breakdown in relationships between the donor's children, it was not appropriate for H.B. to hold the position of attorney. He pointed out that, the attorney would have to consult with the notice parties on decisions that would have to be made concerning the donor and her assets. In particular, in relation to personal care decisions concerning the donor. He submitted that given the hostile relationship between the attorney and the notice parties, it would be unlikely that agreement would be reached on such issues, with the consequence that there may have to be applications to court for directions. This would be both time consuming and expensive, leading to a significant reduction in the donor's estate. He stated that his clients had a genuine fear that they would be excluded from decisions concerning their mother's care.

28. Counsel further submitted that in all the circumstances, having regard to the family dynamic that existed between the siblings, it would be preferable that the court would either appoint an independent person, such as a solicitor, to act as the donor's attorney, or would admit the donor to wardship and appoint an independent person to act as her committee.

29. In support of this contention, counsel referred to a number of cases. In the case of *Re W*. 2000 1 All E.R. 175, the issue of hostility between the donor's children was looked at. Counsel submitted that this case laid down the correct test which should be applied in deciding whether the hostility was of sufficient gravity to disentitle one of the children to act as the donor's attorney. In particular, he referred to the head note which read as follows at para. 2:-

*"Hostility towards the attorney on the part of other interested parties did not of itself mean that the attorney was unsuitable within the meaning of [equivalent section to s. 10 in the Irish Act]. Such hostility would render an attorney unsuitable only if it would impact adversely on the administration of the estate. In the instant case as the affairs of the estate were not complicated, the hostility between W's children would not interfere with the smooth running of the administration and it would therefore have been wrong to frustrate W's choice of attorney."*

30. Counsel also referred to the following portion from the judgment of Jules Sher Q.C. at p. 182:-

*"Whether it is or is not a good idea for a parent in Mrs. W's position, when such hostility exists, to appoint one child alone as attorney is another question. But Mrs. W did so and on the evidence, did so knowing of the hostility. That is her prerogative and in my judgment, when the hostility does not interfere with the smooth running of the administration, the court should not interfere on the ground of unsuitability."*

31. Counsel also referred to *Re Hamilton's Application* 1999 3 IR 310, where an objection was raised to the registration of the EPA, due to the alleged mismanagement by the attorneys of the donor's estate up to the time that the objection had been made. In the course of his judgment, Morris P. stated as follows in relation to an objection based on lack of skill on the part of the attorney:-

*"In my view, lack of business skill is not a valid objection to the registration under section 10. It is perfectly normal for a donor to choose a member of his or her family or somebody sympathetic to him or her to act as an attorney. It would, in my view, be an improper exercise of the discretion vested in the court to refuse to register an instrument simply because the chosen attorney did not possess management and business skills in a high degree. In my view the word 'unsuitable' when used in s. 10 has no connection with the proposed attorney's skill at managing the donor's property. A criticism made of a proposed attorney, to constitute a ground for refusing to register an instrument, must far exceed the corresponding test applied by the courts in applications for the removal of a trustee...."*

*I believe that it is clear that for an objection to be upheld by the court a criticism far more fundamental than mere lack of management skills must be established."*

32. Counsel submitted that the portion of the judgment of Morris P. which stated that the grounds for removal of an attorney must exceed those for removal of a trustee were *obiter dicta*. Counsel noted that in the subsequent case of *M.L. v. D.W.* [2016] IEHC 164, where Kelly P. agreed with the judgment of Morris P. in *Hamilton's* case, he did not refer to the trustee test as being the correct test for determining the suitability of an attorney. Kelly P. also agreed with the observations of Baker J. in *Re S.C.R.* 2015 IEHC 308, where she had stated as follows in relation to the burden of proof placed upon the objectors:-

*"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."*

33. Mr. McParland, B.L., submitted that the following relevant factors had to be considered by the court when considering the issue of the suitability of the attorney: (i) the burden of proof rested upon the objectors to prove "unsuitability" of the attorney; (ii) there must be a fundamental objection to his acting as attorney; and (iii) the court must look at all the circumstances of the case. Counsel stated that the objection to H.B. acting as attorney, was not one that was general in nature. However, it was submitted that having regard to the circumstances of this case, and in particular having regard to the breakdown of relations between the donor's children, the attorney was not suitable to carry out that role under the EPA.

### **Suitability Issue – the Attorney’s Reply**

34. The attorney swore two affidavits on 17th May, 2016, and 30th September, 2016. He also gave oral evidence at the hearing of the objections. As already noted, he took issue with the factual assertions made in the affidavits sworn by the notice parties. It is not necessary to set out extensively the full content of his reply to these assertions. However, it is appropriate to give a brief account of his replies in respect of each assertion.

35. In relation to the assertion that he had acted negligently in the administration of his aunt’s estate, the attorney stated that there had been some delay, which was due to the fact that the title deeds to her property had been lost for some time. They were subsequently found in the possession of a local bank. A further factor leading to the delay in administering the estate, was the fact that there were ten beneficiaries to the estate. A further factor was the fact that his father became ill during this period. The attorney pointed out that his aunt had died in 2011 and that the estate had been finally distributed by September 2013. He also pointed out that no loss had occurred to the estate, as the value of his aunt’s house had risen by €100,000 in the period between her death and the final distribution of her estate.

36. In relation to the assertion that he had acted negligently when he worked as an accountant and company secretary to Expert Hardware Limited, he stated that while G.B. had exhibited a letter from the chairman of the board of directors dated July 2016, saying that they were not happy with the attorney’s performance and had to sack him from his position as the company’s accountant; the attorney exhibited two emails from the same man sent at the end of 2011 and 2012, in which the chairman thanked him for all his help and good work throughout the years. The attorney denied that he had acted in any way improperly in the performance of his duties for the company. He set out in great detail his involvement with the company since its incorporation. He emphatically denied that he had acted negligently.

37. In relation to the complaint which has been made against him to the Institute of Chartered Accountants he stated that this body has investigated the complainant, had found that he had no case to answer. It is not necessary to set out all the details of his rebuttal. It is only necessary to note that this assertion by G.B. was strongly denied by the attorney.

38. Turning to the acrimonious meeting which had been held on 12th January, 2014, the attorney stated that the meeting had been called due to the fact that the donor had made it clear that she wished to stay in the family home for as long as possible. However, the children had concerns for her safety, due to the fact that she was living alone in the house and had suffered occasional falls over the previous years. The attorney stated that G.B. suggested that cameras should be put in the house so that they could have visual access to the house and monitor the donor’s safety. The donor did not wish to have cameras installed in the bedroom or bathroom and the matter was not resolved. The attorney outlined how there had been some discussion then concerning the holding of a month’s mind mass for their deceased father. Apparently, in the parish in which they lived, such masses were only held on a Saturday and the donor had arranged for the mass to take place on Saturday, 18th January, 2014. However, this apparently did not suit G.B., who had to work that day, nor did it suit M.B., who had a meeting scheduled for that day. The attorney stated that M.B. indicated that she would organise her own month’s mind mass. He stated that she dismissed the donor’s wishes to have the mass exactly a month after the passing of their father. He stated that this upset the donor greatly.

39. The attorney stated that later in the meeting, his sister became very hostile towards him in relation to his administration of his aunt’s estate. He stated that G.B. also became verbally aggressive in relation to the manner in which he had carried out his duties as accountant to the hardware company.

40. The attorney stated that his sister left the house slamming the front door after her. He stated that his brother, G.B., slammed his fist on the kitchen table and angrily left the house. He stated that his mother was extremely shocked and traumatised as a result. He went on to outline how his mother had previously been upset with his brother and sister when they had made the funeral arrangements in respect of his father’s funeral. The attorney went on to state that his mother was so upset over the meeting held on 12th January, 2014, and at the behaviour of M.B. and G.B., along with their lack of cooperation and opposition to the month’s mind mass, that she cancelled the month’s mind mass, which she had arranged and at the suggestion of Cannon Maloney, arranged a quiet mass to be held instead in the family home on that date. That mass was attended by the donor, the deponent, the deponent’s wife and the donor’s niece.

41. In relation to the assertion that he had told his mother that the notice parties wanted to get her out of her home and into a nursing home, he stated that at the meeting, G.B. asked where his mother had got that idea. H.B. stated that he told G.B. that it was the donor who said to him that, on Christmas Day, G.B. himself had talked to her about the house being too big for her and asked her was she going to sell it. The attorney denied that he had told his mother that the notice parties intended to put her in a nursing home.

42. In relation to the visit by his sister, M.B., to the house on 21st January, 2014, he stated that he could not understand why his sister was not able to enter the premises, as the locks had not been changed at that time. The attorney stated that on that date, he had gone to his mother’s house with groceries. He stated that he was met by his sister and her husband. His sister informed him that she could not get into the house. He opened the front door and his sister and her husband entered the house. He stated that he went into the kitchen to tell his mother that they had called. He stated that his sister left before he returned and without meeting her mother. His sister had not made any contact with him since and as far as he was aware, she had not made contact with her mother, either personally or by telephone or letter or by any other means since that time.

43. The attorney denied that he had slammed the door in his sister’s face or at all. He stated that when she left the house, her husband spoke with the donor. He stated that he was not in the kitchen with them at that time and he was not a party to their conversation. He did not accept the assertion that his sister had telephoned her mother on two occasions. He further stated that his mother had received copious post over the next year and a half to include bills, letters, Christmas cards, birthday cards and a letter from G.B. dated 24th February, 2014.

44. On 24th January, 2014, the donor completed a general power of attorney wherein H.B. was appointed as her attorney. This power of attorney was executed in her home in the presence of a solicitor, Mr. Michael O’Dwyer. On 4th February, 2014, he received further instructions from the donor to draw up an Enduring Power of Attorney. That document was executed at her home on 7th February, 2014. The circumstances surrounding the creation and execution of these documents is dealt with later in this judgment in the section dealing with the allegation of undue pressure.

45. On 18th February, 2014, the locks on the donor’s home were changed. In his first affidavit, the attorney outlined the circumstances in which the locks came to be changed. He stated that as a result of the behaviour of the notice parties at the meeting on 12th January, 2014, that on the following day, due to this behaviour and the fact that she was now living alone, the donor stated to the attorney that too many people had keys to her house and could walk in unannounced at any time. For this

reason, she wished to have the locks on the house changed. The attorney stated that he asked his mother to reconsider her decision, but she insisted that that was what she wanted.

46. On 20th February, 2014, the donor wrote a letter to G.B., seeking the return of €20,000, which her husband had lent to him. The attorney gave the background to that letter in the following way: on 21st January, 2014, the donor had received a letter from Mr. John Landy, Solicitor and executor to her deceased's husband's estate, setting out the balance in joint accounts that she had held with her husband. From these documents, she became aware that her husband had authorised the transfer of €20,000 from their joint bank account in AIB to a partnership account in the names of her husband and G.B. in AIB on 18th November, 2013. The attorney stated that his mother had not been aware of this transfer. She wrote a letter to G.B., which had been typed by H.B. upon her instruction, asking him to return the said monies, because she was not in a strong financial position. She informed G.B. that her only asset at that time, which she could sell if she needed money, was the property in Co. Kerry. The attorney stated that his sister and Mr. Landy were sent a copy of the letter. He exhibited a copy of that letter to his affidavit. He stated that his mother was very concerned about her financial position as her income comprised solely of her pension and she had expenses pertaining to the running of her house in Dublin and in relation to the property in Co. Kerry. The attorney went on to state that his brother, G.B., replied by letter claiming that he had been given the money by his father as a gift to pay a tax bill and that he was not in a position to support or help his mother financially.

47. The attorney went on to outline his version of the incident at the donor's home on 24th February, 2014, when the gardaí had been called. He stated that on that date, he had called to see his mother around lunch time, accompanied by his six year old son. His son remained outside in the car. His brother, G.B., and his wife were present in the kitchen with his mother. The attorney stated that when he asked his mother was she alright, G.B. immediately became enraged and violently grabbed a metal chair. H.B. stated that he ran out of the house and G.B. followed him, holding the chair in a threatening manner. He stated that G.B.'s wife attempted to restrain him. He said that he feared for his safety and for the safety of his son and for the safety of his mother, so he called the gardaí. They arrived on the scene and took details of the incident. H.B. stated that it was his brother, G.B., who was at all times the aggressor in that incident and that he utterly failed to control his temper. He refuted the assertion by G.B. that he was told that he would have to make an appointment to see his mother through him. After discussion with the gardaí, the donor agreed that it would be better if G.B. rang his mother before he visited, due to the way he had just conducted himself. His brother and his wife left indicating that they would not be back. G.B. did not make any contact with H.B. thereafter and as far as he was aware did not contact his mother by way of personal visit, telephone, letter or otherwise until 22nd December, 2015, when he had visited her in hospital.

48. The attorney also dealt with a letter which had been written on 28th January, 2014, by G.B. to the Public Health Nurse, informing her that he and his sister were very worried about their mother's wellbeing. The attorney stated that this concern was difficult to reconcile with their subsequent conduct of discontinuing all communication with the donor and failing to play any part in her care or, to contribute in any way whatsoever to her wellbeing over a period of almost two years, at a time when the donor was advancing in years, was physically deteriorating and was living alone. The attorney denied that they had been told that they were no longer welcome at the house. He stated that the donor was informed in March 2014 that such a letter had been written. She suffered undue stress until a copy of the letter was released to her under the Freedom of Information Act 1997 in June 2014.

49. In his evidence, the attorney stated that since in or about February 2014, he had been the sole carer for his mother. Due to her mobility difficulties, she had required his assistance whenever she wished to leave her home. The attorney stated that he communicated with his mother on a daily basis. He also called to see her in the house on a very frequent basis.

50. In relation to the sale of the property known as Rath in Co. Kerry, the attorney stated that the donor had decided to sell the property as she had lost income from a pension which had been payable to her husband after his death in December 2013. She had very little resources of her own, as evidenced by her letter to G.B. in February 2014, seeking repayment of the sum of €20,000. In addition, she was no longer able to go down to the property in Kerry and its upkeep was costing her a significant amount of money. In July 2015, she sold the property, as she required the money to live on.

51. In relation to the creation of the general power of attorney, H.B. stated that this was done at the request of the solicitors who were acting in relation to the administration of his father's estate. His mother needed to close a number of joint accounts and reopen them in her own name. She was not able to travel to the bank's branch on the Naas Road and so it was suggested by the solicitor that the attorney should be given a general power of attorney to take the necessary steps in relation to these accounts. This led to the execution of the general power of attorney. In the events which transpired, the local branch of the bank accepted documents signed by the donor, so the general power of attorney was never acted upon.

52. In relation to the creation of the EPA, the attorney stated that while his mother was disabled physically, due to her advancing years and the effect of the polio which she had contracted earlier in her life, she was very clear mentally. The decision to create the EPA, was hers alone. The circumstances surrounding the creation of these powers of attorney is dealt with later in this judgment.

53. In relation to the allegation that when the defendant suffered the stroke in November 2015, that the attorney never told the notice parties about this, he stated that there were two explanations for this. Firstly, by the time the ambulance arrived to the donor's house, the donor had made a substantial recovery, so it was not an emergency admission to hospital; it was purely for investigations and recuperation. Secondly, by that time, the notice parties had not been in contact with their mother for in excess of eighteen months, so the attorney stated that he felt that it was not necessary to inform them of this development. The attorney stated that as it had been a mild stroke, he had not thought it serious enough to contact people who had shown no interest in her. He pointed out that he was not the attorney at that time and hence was under no duty to inform them of developments in relation to their mother's health. Furthermore, he pointed out that when the notice parties did learn of the stroke, they only visited the donor on one occasion each.

54. In the course of his evidence, it was put to the attorney that given the disputes between him and his siblings, it would be difficult for him to act as attorney of his mother's estate. He stated that the dispute was all on the side of the notice parties. He had no dispute with them. It was they who had withdrawn from the family and ceased contact with their mother. He stated that he would have welcomed some assistance during the years, when he had cared for his mother after February 2014. He denied that he had fuelled the disputes in any way.

55. In relation to the current position concerning the donor's estate, the attorney stated that she was now resident in a nursing home. The proceeds of sale of the property at Rath in Co. Kerry, would be sufficient to enable her to remain in the nursing home for a further eight years. She is currently 91 years of age. He stated that the property in Co. Dublin was a five bed-roomed house on a substantial plot of land and contained an outdoor swimming pool. The house was apparently in his father's name, so it would have to be administered as part of his father's estate in due course. The second named notice party is named as executor in his father's Will.

56. The attorney stated that there were a number of factors which pointed to him as being suitable to look after the donor and her estate. Firstly, he was a chartered accountant and was a successful businessman. In addition, he had looked after his mother's affairs for a number of years. On this basis, he submitted that he was eminently suitable to act as the attorney under the EPA.

57. Counsel for the attorney, submitted that registration of the EPA would not of itself, perpetuate any dispute between the children. She pointed out that the donor had acted at a time when she had full mental capacity. She had appointed H.B. as her attorney. On the basis of the decision in *Re W.*, it was clear that hostility between the children of the donor was not relevant, unless it was of such severity as to prevent the proper administration of the estate. Counsel submitted that at present, the estate was relatively simple to administer. The donor was in a nursing home and the expenses thereof were being discharged out of the proceeds of sale of the property at Rath, together with her small pension. This source of funds will last for a further eight years.

58. Counsel also pointed out that the donor was aware of the hostilities between the children at the time that she made the decision to appoint H.B. as her attorney under the EPA. Her choice in this regard, should be given full legal effect by the court.

59. In relation to the lack of communication after February 2014, counsel noted that s. 7 of the 1996 Act, did not come into effect until the EPA was registered, so there was no duty on H.B. to notify the family of the deterioration in his mother's health. Counsel pointed out that it was the notice parties who had ceased contact with their mother. M.B. had returned to the house once after the acrimonious meeting on 12th January, 2014. On that second visit, she did not talk to her mother and did not return to the house after that. She had no further communication with her mother. It was clear from the affidavits, that M.B. was aggrieved that the property in Co. Kerry had not been left to her, or otherwise transferred to her. Counsel pointed out that G.B. had also returned to the property, but that on the occasion of his visit, there had been a row between him and the attorney and the gardai had been called. He had not returned to the property after that date. In circumstances where the attorney had single handily looked after his mother since that time, it was entirely appropriate that he be appointed attorney under the EPA. The notice parties had ceased contact with their mother of their own volition. The donor lived near them and they could have easily called over to see her. While the locks had been changed, there was no evidence that the notice parties had called over to the house after that date and were unable to secure admission to it. They did not try to make contact with the donor and that was their own decision.

60. In the circumstances, it was submitted that the notice parties had not discharged the burden which lay upon them to establish that in all the circumstances, the attorney was unsuitable to act as the attorney appointed under the EPA.

#### **Allegation of undue pressure**

61. In opening this part of the case on behalf of the notice parties, counsel stated that there was no allegation of fraud on the part of the attorney. Nor were they making the case that there was overt intimidation of the donor by the attorney, but that he had exerted a "subtle, even unconscious" pressure on the donor to execute the EPA.

62. The notice parties relied on a number of factors to support this contention. Firstly, it was an undeniable fact that due to the lack of mobility on the part of the donor, she relied heavily on the attorney to do shopping for her and to bring her on trips outside her home. It was pointed out that in the attendance note made by Mr. O'Dwyer, the solicitor, he recorded the donor as saying "[H] does everything for me". The fact of the matter was that the donor relied heavily on the attorney. She could not live in her home without the attorney's help.

63. The notice parties pointed out that on the day following the acrimonious meeting held on 12th January, 2014, the attorney called to the solicitor's offices, saying that his mother wanted to make a general power of attorney. It was the notice parties' belief, that their mother wrongly believed that they had wanted to put her out of her house and into a nursing home. The notice parties maintained that this belief on the part of the donor was due to what she had been told by the attorney.

64. The notice parties stated that H.B. had been instrumental in having the two powers of attorney executed by his mother. They pointed out that he was present in the house on all the occasions when the solicitor attended there.

65. The notice parties accepted that he had not been actually present in the room when the solicitor discussed the creation of the powers of attorney with the donor, nor when she actually executed these two documents. Nevertheless, they maintained that the attorney had exerted an unconscious pressure on the donor, by directing what steps should be taken in the matter.

66. They also submitted that the attorney had exercised control over who should see his mother, by changing the locks on the house on 18th February, 2014.

67. The notice parties also maintained that the execution of a new Will by the donor in the early part of 2014, was a cause for concern and tended to support the conclusion that the attorney was exercising an element of control over the donor. In this regard, it was pointed out that the donor had made a Will with her husband on 2nd October, 2013. Her husband had died on 18th December, 2013. A few months later, she had executed the general power of attorney and the EPA. The notice parties also believed that she made a new Will in the early part of 2014. It was not clear why she should have thought it necessary to do this, having regard to the fact that she had executed a Will in October, 2013. The notice parties had not been told of the execution of this new Will, nor of its contents.

68. Counsel for the notice parties referred to the decision in *Carroll v. Carroll* 1999 4 IR 241, which referred to the making of a gift and when the presumption of undue influence will arise. In that case the making of the gift had been deemed to be an improvident transaction on the part of the donor. Counsel stated that he accepted that this case was different in that the creation of the EPA was not a transaction. He accepted that the creation of the EPA and the naming of H.B. as the attorney, did not of itself raise any presumption of undue influence. However, he stated that in the circumstances of this case, where the donor relied heavily on the attorney and where it could be seen that he did all the running in relation to the creation of the EPA, in that he had arranged for the solicitor to attend at the house and was present when the solicitor actually arrived there, this was sufficient to enable the Court to reach the conclusion that the attorney had exercised undue pressure on the donor in relation to the creation of the EPA. Counsel pointed out that the notice parties did not object to the execution of the EPA, or the appointment of H.B. as the attorney therein at the time that it was created, because the right to object only arose when there was an application to register the EPA. While they were given notice of the making of the EPA, they were not furnished with a copy of it at that time. It was submitted that they had no right to object to the terms of the EPA at that stage. It was submitted that the EPA was similar in effect to a Will, which only speaks from death. The EPA only becomes operative when it is activated following a successful application for registration of the EPA to the High Court. It was for this reason that they had not asserted that H.B. had exercised undue pressure on the donor, at an earlier stage.

#### **Undue Pressure – the Attorney's Response**

69. In his evidence, the attorney denied that he had ever exerted any undue pressure on the donor to have himself appointed as attorney under the EPA. He pointed out that when the donor created the EPA, she did so knowing of the strained relations between her children and at a time when she was fully in control of her mental faculties.

70. H.B. also stated that he had attended to all the donor's needs after February 2014 due to the simple fact that the notice parties had withdrawn and ceased to have any contact with the donor.

71. He stated that while he did not know the exact date of his mother's new Will, he thought that it had been executed in March 2014. He could not say why the donor has thought it necessary to execute a new Will at that time. It had been her decision. She had done it with the solicitor.

72. The attorney also relied on the affidavit of Mr. Michael O'Dwyer, solicitor, sworn on 6th July, 2016. In the course of a detailed affidavit, Mr. O'Dwyer gave an account of how he came to take instructions from the donor in relation to both the general power of attorney and the EPA. As the question of the donor's mental capacity to make either of the powers of attorney is not in issue, it is not necessary to set out in detail the content of that affidavit. However, the deponent also dealt with the issue of undue influence, which is relevant. He began by outlining his first involvement in the matter, which was brought about when H.B. called to his offices on Monday, 13th January, 2014. H.B. advised that his mother wished to create a general power of attorney, but was unable to attend his office due to her physical disability. Mr. O'Dwyer stated that it was his practice to only act on instructions in relation to powers of attorney after careful consideration of the donor's instructions and their capacity to provide same. When satisfied that they understand the nature and effect of giving a power of attorney and that there was no question of undue influence, he would agree to act. This was particularly so, where the power was intended to be given by a donor to one or more of their children.

73. Mr. O'Dwyer stated that on 15th January, 2014 he called to the donor's house. He was admitted to the house by H.B. and brought to the kitchen/living room, where the donor was sitting. He stated that he met and talked with the donor alone for the duration of the consultation. He stated that as a result of that meeting, he had no doubt in his mind as to the donor's legal and mental capacity. He was satisfied that the donor understood the nature and effect of the general power of attorney, the nature and extent of her assets, who her relatives were and that she had decision making ability and the ability to express her wishes clearly. She confirmed to him that there had been no undue influence exerted on her. Mr. O'Dwyer stated that he explained the nature and seriousness of the creation of a general power of attorney. At that meeting, he also advised the donor about the possibility of creating an enduring power of attorney. He explained in simple language the meaning of an enduring power of attorney and how it differed from a general power of attorney. In his affidavit, Mr. O'Dwyer set out in detail the explanation that he had given to the donor in respect of an EPA.

74. He next met the donor on 24th January, 2014 at her home, when he asked the donor to sign an acknowledgement of advice which he had given to her and which she signed. She then completed the signing of the general power of attorney. They also discussed the EPA again and the donor confirmed that she would consider it and perhaps complete one at a future date. Mr. O'Dwyer stated that he was satisfied from talking to the donor, that she was very capable of expressing her opinions and was capable of telling him what she wanted to do. She did not appear to be delusional, nor did she engage in fantasy stories, as had been suggested by M.B.

75. Mr. O'Dwyer stated that he received further instructions from the donor on 4th February, 2014, asking him to complete the EPA that week. He subsequently received a note from Dr. Mark Holmes dated 5th February, 2014 confirming that the donor was a patient of his practice and was fit and well and of sound mind with normal mental capacity.

76. On 7th February, 2014, Mr. O'Dwyer again attended at the donor's house. He read aloud the different sections of the EPA to the donor. He stated that he does that with all clients before they sign the EPA. He told her that if she was satisfied with the document, she could sign the document where he had indicated and he would witness her signature. She executed the EPA documents by signing her name in his presence and also signed the notices which were subsequently given to the notice parties. H.B. signed his name agreeing to be the attorney at Part C of the document and Mr. O'Dwyer completed the statement at Part D, stating that after interviewing the donor, he was satisfied that she understood the effect of creating the enduring power and he had no reason to believe that the document was being executed by the donor as a result of fraud or undue pressure.

77. Mr. O'Dwyer stated that he would not have taken instructions from the donor or allowed her to sign the EPA, if he had any doubt about her understanding of the effect of creating the enduring power, or if he had any reason to believe she was creating it as a result of fraud or undue pressure.

78. Mr. O'Dwyer went on in his affidavit to outline the circumstances in which he came to receive instructions from the donor to sell the property at Rath in County Kerry. It is not necessary to go into that matter at the present time.

79. At para. 10 of his affidavit he stated that during all of his meetings with the donor, he did not think her delusional on any occasion. She appeared to him to be fully aware of her circumstances and expressed sadness that she had fallen out with her daughter and that her daughter had not spoken to her since the time of her husband's death. Mr. O'Dwyer stated that the donor confirmed to him on more than one occasion that she was not under any undue influence or pressure. She regarded her son, H.B., to be a suitable person to be her attorney. Mr. O'Dwyer exhibited in his affidavit the detailed attendance notes that he took on each occasion that he visited the donor.

80. Evidence was also given by a number of independent witnesses to the effect that they never saw the attorney mistreating the donor, or putting her under any sort of pressure. Evidence was given by Ms. Gemma O'Hanlon, who stated that she had known the attorney since 1971 and they lived near each other. She stated that she also knew his parents. She visited the donor after her husband died. She also made a 90th birthday cake for her. She said that she was a frequent visitor to the house. Her husband also accompanied her on a number of these visits. She stated that she also visited the donor in the nursing home. She stated that she had seen H.B. in the nursing home visiting his mother and also when he brought her to church for mass. She stated that H.B. always looked after his mother very well. He never spoke sharply to her. He was very loving and kind towards his mother. She stated that the donor never expressed any concerns to her about her son, H.B. She used to speak about H.B. and his children. This witness was not cross examined.

81. Evidence was also given by her husband, Mr. Sean O'Hanlon. He stated that he knew H.B. since 1969. He had been on a church committee with H.B.'s father and through this he got to know the family. He stated that in his opinion, H.B. was a very honourable man. H.B. loved his mother and had done a lot to keep her happy in every way. He never saw H.B. being cranky or controlling towards his mother. The donor always spoke very nicely about H.B. He stated that H.B. had put his family life aside, to make sure that his mother was well looked after. He often stayed in her home at night to keep an eye on her.

82. Evidence was given by Mr. Michael Hanway, who lives next door to H.B. He stated that he knew H.B. for more than twenty years.

He said that one could not have a better neighbour. They are good friends and they socialise together. The witness stated that he saw H.B. with his mother a few years ago when she visited H.B. She seemed very happy to be at his home. There was a normal relationship between H.B. and his mother. He never saw him act in any way that would cause concern. This witness was not cross examined.

83. Evidence was given by Ms. Grainne Henry. She stated that she had first met the donor at H.B.'s wedding. She knew her since approximately 2004. After the donor's husband died, she stayed with the donor when H.B. and his wife were away. H.B. would often ring his mother. The donor said that he was a very good son. She never said anything about H.B. which would give rise to a cause for concern.

84. The witness stated that the donor was a very forthright person who would say what she wanted and knew her own mind. If she did not want something, she would let that be known. She was well able to make up her own mind.

85. Ms. Henry said that she never saw H.B. trying to control his mother. She stated that when she went up to the property, H.B. would tell her what medication to give to his mother and what food was prepared for her and would also tell her when the carers would come in. In her opinion, H.B. had a normal loving relationship with his mother.

86. In cross examination, the witness stated that after her husband died, the donor was very lonely. She missed her husband a lot. It was put to the witness that when her granddaughter had visited the donor, she found that she was very down in herself in November 2014. Ms. Henry stated that the donor could have times when she was feeling down. She stated that on Fridays she would bring Sr. Sabina and she would give communion to the donor and they would pray together. On Mondays, the gardener would be at the house. On Thursdays, the housekeeper, Agnes, would come in. This meant that the donor had a number of visitors throughout the week. The witness accepted that the donor was reliant on H.B. and missed her husband, who had cared for her during his life. She stated that the donor had hoped to remain in her house until she died, but she had not anticipated the stroke which occurred in 2015. She had also had two falls. Her health was not robust, she used a walking frame, but was self-caring and cognitively she was in good health.

### **Conclusions**

87. Having heard this application largely on affidavit evidence, this Court cannot make any determination as to whether the attorney administered his deceased's aunt's estate in a proper manner, or whether the allegations made in relation to his handling of the accounts of Expert Hardware Limited were wellfounded or not. Nor can the court adjudicate on which party is accurate in relation to the acrimonious meeting held on 12th January, 2014, or in relation to the subsequent incidents which arose in the weeks immediately after that meeting.

88. It is neither possible, nor necessary, for this Court to determine whose version of these events is correct. However, the court can conclude that the affidavit evidence and the oral evidence demonstrate that there has been a serious breakdown of relations between the attorney and his brother and sister. There would also appear to have been a breakdown in the relations between the notice parties and their mother.

89. The key question is whether the hostility between the siblings is sufficient to render the attorney unsuitable in all the circumstances to act as attorney under the EPA. While the decision in *Re W.* 2000 1 All E.R. 175, is not binding on me, I am satisfied that it sets out a sensible and workable test for deciding when hostility between the parties would be sufficient to render an attorney unsuitable to act in that capacity. In that case, it was held that hostility would render an attorney unsuitable only if it would impact adversely on the administration of the estate.

90. In this case, the donor's estate seems to be relatively straightforward. Her house in Kerry has been sold and the proceeds thereof are sufficient to pay for her upkeep in a nursing home for the next eight years. All I know about the property in Dublin is that it is a substantial property, in a good area in the county. It is apparently in the name of the donor's deceased husband, so *prima facie* it will fall to be dealt with as part of his estate. It may come to be part of the donor's estate either under his Will or by operation of law.

91. Notwithstanding the incidents that have occurred between the parties to date, I accept the evidence of the attorney that he has not tried to exclude the notice parties from visiting or communicating with the donor. I accept his evidence that for whatever reasons they may have done so, the notice parties have effectively had no meaningful contact with the donor since February 2014. In such circumstances, it was entirely reasonable for the donor to appoint H.B. as her attorney.

92. I also accept the evidence of Mr. O'Dwyer, as set out in detail in his affidavit, that the donor was completely in control of her mental faculties when she executed the EPA. In these circumstances, the court should be very slow to interfere with the wishes of the donor as to who she wished to have as her attorney.

93. In this case, the administration of the donor's estate is relatively simple. The nursing home will be paid out of the proceeds of Rath. If and when the house in Dublin comes to form part of her estate, a decision will have to be made in approximately eight years, whether the property should be sold in order to pay for her continued care in the nursing home. In these circumstances, I do not think that the hostility between the parties is sufficient to disregard the donor's wishes and to declare the attorney as being unsuitable to act as her attorney under the EPA. Accordingly, I refuse to grant the relief sought under the first ground of objection.

94. Turning to the question of the alleged undue pressure on the donor by the attorney, I accept the evidence set out in the affidavit of Mr. O'Dwyer, to the effect, that he was entirely satisfied that the donor was not acting under any undue pressure when giving him instructions to draw up the EPA, or when she subsequently executed the document. I also accept the evidence of the independent witnesses, that they never saw the attorney placing any pressure on his mother.

95. The burden of establishing that undue pressure was applied by the attorney to his mother, rests on the notice parties. This is not a case of a person, who is elderly or dependent upon another person, making an improvident gift or transaction for the benefit of that other person, such that the court should presume that there was undue influence. All the attorney has is a power to manage the deceased's estate for her benefit. He is not given any beneficial interest in her estate. The EPA does not provide that he is to receive any payment for his services in acting as the attorney. He will be under a duty as the attorney to account for his management of her affairs.

96. While it is somewhat surprising that the donor executed a new Will in March 2014, when she had previously executed a Will with her husband in October 2013, the court does not regard the happening of this event as corroboration of the assertion that the attorney exercised undue pressure on the donor in relation to the execution of the EPA on 7th February, 2014.

97. In the circumstances, the notice parties have not established that there was undue pressure brought to bear on the donor by the



attorney in relation to the creation of the EPA. Accordingly, this ground of objection to the registration of the EPA is also dismissed.

98. In view of the findings made herein, I will make an order that it is appropriate to register the EPA herein which was executed on 7th February, 2014.

99. However, having regard to the history of the relations between the parties, I am satisfied that it is appropriate for the court to give directions under s. 12 of the 1996 Act. I give the following directions:-

(i) The attorney is to furnish accounts and produce appropriate records as to his management of the donor's estate from 1st July, 2015 to 31st December, 2016, on or before 31st January, 2017. These accounts need not be particularly detailed, but they should set out clearly all sources of income of the donor in the relevant period and a clear statement of all expenditure made for the benefit of the donor during the same period. They should give the balances of any accounts held by the donor in any banks or financial institutions as of 31st December, 2016. These accounts and records are to be sent by post or email to the solicitors acting for the notice parties.

(ii) Thereafter, the attorney is to produce accounts and records in respect of his management of the donor's estate on or before 31st January of each succeeding year in respect of the immediately preceding calendar year. These accounts and records are to be produced to the solicitors acting for the notice parties.

(iii) Liberty to the parties to apply in the event that there is any dispute concerning the manner in which the attorney should manage the donor's estate, or in relation to any failure by him to furnish the accounts and records as directed herein.