

THE HIGH COURT

IN THE MATTER OF THE POWERS OF ATTORNEY ACT, 1996 IN THE MATTER OF AN INSTRUMENT CREATING AN ENDURING POWER OF ATTORNEY EXECUTED BY C.F. AND F.F. ON THE 1st NOVEMBER 2007

BETWEEN

A.A., B.B., C.C., D.D., E.E.

APPLICANTS

AND

F.F.

RESPONDENT

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

1. The Powers of Attorney Act, 1996 (the "Act of 1996") created for the first time the possibility in Irish law of executing a power of attorney which could continue to operate when the donor of the power is or is becoming mentally incapable. The enduring power created under the Act, the characteristics of which are defined by statute, enables a person to put in place a system by which a person or persons of their choice will manage their financial affairs during an anticipated or possible incapacity in the future. The legislation was enacted in the context of a lacuna in the existing law because a power of attorney ceased to operate at common law if the donor of the power became mentally incapable.

2. This case relates to the extent to which the attorney appointed by a registered power of attorney, that is a power which becomes operative by virtue of registration under the statutory provisions, may be supervised by the court, or is accountable to the court or to any other person who has the interests of the donor in mind.

Enduring powers of attorney

3. Section 5(1) of the Act of 1996 defines a power of attorney as being an enduring power if:-

"the instrument creating the power contains a statement by the donor to the effect that the donor intends the power to be effective during any subsequent mental incapacity of the donor and complies with the provisions of this section and regulations made thereunder."

4. Section 5 provides that an enduring power of attorney may permit the attorney to make personal care decisions on behalf of the donor, may confine him or her to making such personal care decisions or may confer general authority. Section 6 of the Act deals with the scope of the authority of an attorney acting under an enduring power and such authority is stated by s. 6(1) to derive from the instrument creating the power. The Act permits a broad range of instruments, including an instrument that confers general authority in relation to all or a specified part of the property and affairs of the donor, and may or may not be conditional or restricted by the stipulations in the instrument.

5. Section 6(2) provides in regard to an enduring power that where the instrument is expressed to confer general authority on the attorney:-

"it operates to confer, subject to the restriction imposed by subsection (5) and to any conditions or restrictions contained in the instrument, authority to do on behalf of the donor anything which the donor can lawfully do by attorney."

The Instrument

6. The forms of the instruments creating an enduring power of attorney are set out in the schedules to S.I. 196 of 1996 and C.F., the donor, in the presence of his solicitor executed a power of attorney in the standard statutory form on the 1st November, 2007 contained in the first schedule. Such an instrument creates a power which is wider in import than the form provided in the second schedule, which gives a power of attorney only in respect of personal care decisions. The power was expressly stated to be effective during any subsequent mental incapacity of the donor, and thus takes effect as an enduring power under the Act.

7. By the instrument the donor appointed his wife, G.F. and F.F., his daughter and the only child of his second marriage to the said G.F., to act jointly as attorneys for the purposes of Part II of the Act of 1996. The standard form provided in the S.I. allows the donor to delete certain provisions which he or she chooses not to apply to the power, and the donor did indeed make several deletions and thereby opted to give to the attorneys thus appointed "general authority to act on my behalf in relation to all my property and affairs."

8. In addition the attorneys were given power to make personal care decisions for the donor without any stipulation for prior consultation with any person as to their views as to his wishes and feelings on certain identified matters as follows:-

- *Where I should live*
- *With whom I should live*
- *Whom I should see and not see*
- *What training or rehabilitation I should get*

- *My diet and dress*
- *Inspection of my personal papers*
- *Housing, social services and other benefits for me*

9. The instrument accordingly created an enduring power of attorney, and gave the attorneys general unrestricted power in relation to business and financial affairs as well as personal care decisions. Thus the attorneys appointed under the instrument by the donor may do all acts and execute all documents that might be required for the proper conduct of his business affairs, his personal financial affairs and his personal care decisions. No person was required to be notified or consulted by the attorneys prior to making any decisions or doing any act as attorney.

10. The legislation requires that the donees of the power certify by their signature the duties and obligations assumed by virtue of the appointment and both attorneys separately executed this part of the instrument in the presence of the solicitor who witnessed the execution of the power by the donor.

11. Each of them declared by their signature the following:-

"I understand my duties and obligations as attorney, including my duty to apply to the High Court for the registration of this Instrument under the Powers of Attorney Act 1996, when the donor is, or is becoming, mentally incapable, my limited power to use the donor's property to benefit persons other than the donor and my obligation to keep accounts in relation to the management and disposal of the donor's property for production to the High Court if required."

12. The donor gave no power to the donees to make gifts nor were the donees of the power entitled to be paid any remuneration for performing the service of attorney.

13. The donees of the power served notice of intention to apply for registration on the 22nd July, 2010 and the instrument was duly registered in the High Court on 12th November, 2010 there being no objection to registration. Affidavit evidence before the court explains that the instrument became registered as a result of a diagnosis that the donor was suffering from dementia and was not capable of managing his own affairs.

This application

14. This application is brought by originating notice of motion by five children of the donor from his first marriage which was dissolved in the mid 1970s. The respondent is the sole surviving attorney appointed under the power of attorney, her mother, the other attorney, having died on the 7th October, 2013

15. The applicants seek directions and orders requiring the attorney to render accounts and to produce records, to include records of the "management and disposal by the Attorney of the property and affairs of the donor and details of all remuneration and expenses claimed by the Attorney from the assets of the donor."

16. There is also sought full details of all personal care decisions taken by the attorney in respect of the donor, an order cancelling registration of the instrument on the ground that the attorney is unsuitable to act as attorney and/or that the registration of the instrument was defective and not in compliance with the Act of 1996.

17. Following the tendering of substantial affidavit evidence, and it being apparent that it was likely that there would be a significant conflict of evidence, it was agreed by counsel that I should first determine the following issues.

- 1) Whether and to what extent an attorney acting under a registered enduring power of attorney is obliged to account to the High Court.
- 2) Whether and to what extent an attorney acting under a registered enduring power of attorney is obliged to account to other persons in a close family connection with the donor.
- 3) The role of the High Court in regard to a registered power of attorney and whether the High Court has a general or specific supervisory role in respect of the exercise of the function by an attorney, and how such supervisory role is to operate in practice.

It is hoped that guidance with regard to these general questions will enable the parties to achieve some degree of agreement as to what, if any, steps are required to be taken in regard to the matters raised in the notice of motion.

The application before me

18. While it has been agreed that this judgment will focus on the general principles surrounding the supervision of an attorney I outline here some of the issues that have arisen between the parties. The donor of the power has a substantial commercial and retail property portfolio, from which he derives a significant rental income. The property is primarily held through corporate vehicles. The donor continues to reside at his home and he has the benefit of full time specialist nursing care. The surviving attorney visits him there but does not live there.

19. The affidavit grounding the motion expresses the view that the applicants have been "effectively kept in the dark in relation to our father's affairs" and have been "totally excluded" from the affairs of their father. They complain that no information has been forthcoming from the attorney in relation to the affairs of their father and the application is made in the context of a request to the attorney to furnish information which the applicants say was refused. The solicitors acting for the attorney replied to the effect that their client had no "obligation to produce accounts and records to your clients", pointing to the fact that the attorneys appointed had full power to deal with all of the affairs of the donor, and that the surviving attorney was well aware of her duties to act in the best interest of the donor.

20. After the matter came on for hearing before me the matters progressed significantly and the attorney in a replying affidavit has indicated that she is prepared to furnish accounts and that she would produce a statement of the donor's current assets, liabilities income and expenditure. She exhibited this in a supplemental affidavit and indicated a willingness to provide such additional information as the applicants might reasonably require.

21. The applicants expressed themselves dissatisfied with what they see as a piecemeal production of information and have expressed

alarm at what they see as an excessive rate of spending in the accounts in the last 12 months.

22. The applicants employed an accountant and auditor to examine the documents furnished and he suggests that he has insufficient information to carry out a comprehensive review. In the course of argument following the service of this affidavit it was suggested by the applicants that what was required was a full and vouched statement of affairs and liberty for the accountant to examine the relevant records for the purposes of taking a view on the state of affairs of the donor. What was sought in correspondence was a "full comprehensive statement of affairs".

23. The respondent says that she is willing to provide information, but the applicants say that what is required is supervision by the High Court and ask for my guidance as to the extent of such supervision, and the extent of accounting that it is necessary.

Agent or trustee?

24. Counsel have furnished me with submissions on the nature of an enduring power of attorney. No argument is made by either of them that a person acting under an enduring power of attorney has a particular or unique function, and as a matter of first principle I do not believe that a person acting under an enduring power of attorney has rights or obligations different from those of an attorney acting under a general power.

25. Counsel disagree as to the true characterisation of such an attorney. The applicants argue that the attorney acting under an enduring power of attorney has a role akin to that of a trustee, and that once a power is registered there reposes a trust in the attorney. Counsel for the respondent argues that the attorney is an agent and not a trustee, although it is accepted that there is some similarity in the role of attorney and trustee, in that both have fiduciary obligations to their principal.

26. Halsbury in his *Laws of England*, 3rd Ed. firmly places a power of attorney within the law of agency and at para. 365 gives a general description of power attorney as a form of agency:

"An agent who has to execute a deed, as, for example, a conveyance or deed. Such an authority is called a power of attorney."

27. In the 20th edition of the leading English text *Bowstead and Reynolds on Agency* the following general comment is made at p. 27:-

"Agents and trustees have many similarities, for both are persons who act on behalf of others and, though agency is essentially a common law notion, much of the law of agency is derived from, or is connected with, the law of trusts, which is of course equitable. But the two roles, though they have considerable overlap, are conceptually different. An agent acts for another; a trustee holds property for another as principal, not as agent, but subject to equitable obligations."

28. I adopt this statement of the law, both as regards the similarity and difference between an agent and a trustee. A trustee acts on behalf of another, and does not act in the shoes of that person, but on behalf of that person and a trustee is not an agent. A trustee can have, depending on the extent of his or her powers under the trust, an entitlement or an obligation to use his or her own judgment in appointing property under a trust or making decisions on behalf of a beneficiary. A trustee acts within the confines of the power vested under the trust instrument, and in the light of the trust purpose, but does not act as the principal, or under the direction of the beneficiary.

29. An agent on the other hand acts as another person or in place of another person, or in the shoes of that person. The agent takes the role of acting as a person for the purposes of doing certain acts or executing certain documents, and does so as that person rather than on behalf of that person.

30. The Act of 1996 in s. 2 defines a "power of attorney" as follows:-

"an instrument signed by or by direction of a person (the donor), or a provision contained in such an instrument, giving the donee the power to act on behalf of the donor in accordance with the terms of the instrument."

31. Section 16 deals with powers of attorney generally and provides that a general power:-

"shall operate to confer on the donee or donees of the power acting in accordance with its terms authority to do on behalf of the donor anything which the donor can lawfully do by attorney".

32. The Act of 1996 identifies the powers of the donee as including the power to execute a document with his or her own signature and/or his or her seal and to do any other thing in his or her own name "by the authority of the donor of the power". Section 17 provides that any instrument executed or thing done in that manner shall be as effective as executed or done by the donee. An attorney executing a deed for example affixes his or her own name to the document by the authority of the donor. The attorney acts as another, in the name of another and by the authority of another. The Act to my mind points to an interpretation of the attorney as an agent rather than as trustee.

33. The Enduring Powers of Attorney Regulations, 1996 provide at reg. 5 the following requirement:-

"An attorney who is appointed to act on the donor's behalf in relation to property and affairs of the donor shall keep adequate accounts of the management thereof and, in particular, of any expenditure to meet the needs of persons other than the donor or to make any gifts authorised by the enduring power."

34. Counsel for the applicants argues that the duty to account makes the donee of the enduring power a trustee. However, all agents have an obligation arising at common law to account to the principal for any monies or goods received from the principal or on account of the principal. In *Coulthard v. Disco Mix Club Ltd* [2000] 1 WLR 707 at 728 Jules Sher Q.C. pointed to the fact that "the simple duty to account, central though it is, is not a fiduciary duty", and I accept that proposition, and the duty to account does not make an attorney a trustee.

35. Counsel also argues that the attorney acting under an enduring power has an obligation to keep the property or monies of the donor separate from those of his own, and that this imports a trust of those monies and property. There is no requirement in the Act or the Regulations that so requires, and one might take a practical approach to the questions and say that an attorney acting on an enduring power who is under an obligation by virtue of Reg. 5 to keep adequate accounts, would be well advised not to mix money, but that does not answer the question of the true substance of the relationship. As the Law Reform Commission noted in its

Consultation Paper on Law and the Elderly (LRC CP 23-2003) no detailed guidance is given to attorneys on the meaning of keeping adequate accounts, or how this may properly be done. The Consultation Paper suggests, sensibly, that if the attorney is the spouse of the donor and living with the donor the requirement to keep separate accounts would be unnecessary, and might interfere with the right of marital privacy. If the spouse is the joint owner of much of the property the accounting requirement would be minimal.

36. The nature of the duty to account, then, will depend on the instrument and the relationship between donor and donee. This is apparent it seems to me from the fact that subject to any restrictions in the instrument itself s.6 (5) of the Act or 1996 imports a power to give gifts, birthday, anniversary or other seasonal gifts either to a relative or to a charity to which the donor might be expected to make gifts. More significantly s.6 (4) provides that the attorney may act under the power for the attorney's own benefit as expressly limited.

37. Thus it seems to me that the nature of the relationship, absent any restrictions or conditions in the instrument itself, might determine the extent to which an attorney is properly speaking obliged to keep his money separate from that of the donor, and a requirement that property and assets of the donor should always be kept separate could not it seems to me to be always mandated.

38. I conclude that an attorney acting under a registered enduring power is closer in characterisation and function to an agent than to a trustee,

Akin to Wardship?

39. Counsel for the applicants suggests some assistance may be gleaned from the wardship jurisdiction. One might, however, say that one of the purposes of the introduction of a statutory scheme for the appointment of an enduring power of attorney was to avoid the necessity of application to court to take into wardship a person with limited or no power to manage his or her own affairs. I turn now to examine the argument.

40. The committee of a ward of court has an onerous obligation as an officer of the court: *Re Fitzgerald (2) Sch. Lef 436*. The committee is limited in the carrying out of powers and duties to any directions given by the judge in wardship, and the committee of the ward requires authorisation from the President of the High Court for the application of the monies of the ward, or to sell the ward's property.

41. The committee is required to provide annual accounts to the High Court and to further account at any times that may be directed by the Registrar: O. 67. r. 63 of the Rules of the Superior Courts. The wardship accounts must be lodged in the Office of the Wards of Court under r. 63 and a statutory form is provided in Appendix K to the Rules for that purpose. The President of the High Court has a supervisory jurisdiction with regard to any and all matters that arise in the wardship generally or that arise from the accounts.

42. An attorney acting under an enduring power of attorney requires no authorisation from the court and the exercise of the power is subject only to any limitations and restrictions contained in the instrument itself. The role, powers and limitations that exist in the case of a committee of a ward of court do not apply in the case of an attorney acting either an enduring power or a general power of attorney and thus whatever the role of the court, it is not akin to the role the court takes in the management of a ward's business, property or affairs.

43. I conclude that the role of attorney acting under an enduring power of attorney is not as a matter of law akin to the role of a committee acting in wardship, and for the roles to be identical or broadly similar would be to ignore the fact that the legislature created in 1996 an alternative process by which the financial and other affairs of an incapable person could be dealt with.

44. Furthermore, it cannot be inconsequential that the procedure for the appointment of an attorney under the legislation provides for the nomination by the donor, at a time when his or her capacity was not in doubt, of the person or persons he or she chooses to act on his or her behalf. One must in that context assume that the persons chosen by the donor were chosen either because of their personal or emotional connection with the donor or because of a perception of their ability and willingness to manage his or her personal or financial affairs, and most attorneys appointed under an enduring power are family members who are entrusted by the donor to act in his or her best interests, and indeed to know what his or her interests and wishes might be. The committee appointed by the court on an application to take a person into wardship is not selected or chosen by the ward, but is chosen by the court in the light of a number of factors including the ward's needs.

45. It cannot be doubted that the donor whose enduring power of attorney has become registered has become by virtue of an incapacity a vulnerable person, frequently vulnerable in the same way as a ward of court is vulnerable. The vulnerability arises in each case from the inability to manage either personal or financial affairs. The means by which the affairs of such vulnerable persons are to be managed are not in my view similar.

Conclusion on the nature of the power

46. The statutory provision which enabled a person to put in place an alternative or substitute decision maker who would have authority to act should the donor become incapable is an important means by which the law recognises the autonomy of a person to choose such a substitute or alternative.

47. A person who takes on the role of an attorney and who acts under an enduring power of attorney during the incapacity of another takes on an onerous responsibility, and one in which the donor of the power is vulnerable and often elderly. The ability to choose and appoint a person to act on one's behalf in the event of incapacity is an important protection to a person, and an important means by which the law respects the wishes of a person as to by whom and how his or her financial and personal care affairs will be dealt with in the event of incapacity. The possibility of creating such a power by instrument was seen as an advance on the then law which required that even very modest estates came under the protection and scrutiny of the President of the High Court in the wardship jurisdiction of that Court, or occasionally of the Circuit Court. The involvement of a committee and of the High Court or Circuit Court interposed a person other than a person chosen by a person to manage his or her affairs. The wardship jurisdiction also carried considerable costs and expenses for the ward and the committee had limited powers to act on behalf of the ward without express authorisation. The law as it existed before the coming into operation of the Act in 1996 in many cases involved the court in unnecessary administrative duties which could in a normal case be dealt with competently and fairly by a person chosen for that purpose, a person who would be assumed to have the best interests of the donor to the forefront of any decision making process.

48. It is clearly intended that the attorney appointed under an enduring power would be a substitute, and that the role of the High Court was not to be merely another class of wardship jurisdiction, or arise from the jurisdiction in equity as exists over a trust. I reject the argument that the High Court has supervisory powers by analogy with those in wardship, and that the Court has inherent powers arising in equity or at common law. The role of the Court has a statutory origin.

The Law Reform Commission Report: the keeping and filing of accounts

49. The Law Reform Commission published a report in 1989 as part of its extensive report on Land Law and Conveyancing Law on the topic of enduring powers of attorney, LRC 31-1989. At paragraph 28 of that Report in a section which considered the duty of attorneys generally the Commission pointed to the fact that at common law an attorney is under a duty to keep accounts and to produce them to the donor. The Commission correctly pointed out that this is an important deterrent against abuse of a power by an attorney but that "[i]t is equally obvious that it is of little use if the donor is incompetent". The Commission considered the requirements to account as it operated in other jurisdictions and noted that some jurisdictions imposed an obligation to file accounts, while others had put in place an independent body, generally the public trustee, who would inspect those accounts.

50. In practice most enduring powers of attorney become activated at a time when the donor is elderly. The Report of the Working Group on Elder Abuse, "Protecting our Future", published in 2002, recommended at para. 2.12 that "adequate supervision and review be put in place" in order to prevent the possible abuse by an attorney in the management of an older person's finances.

51. The Law Reform Commission in its Consultation Paper on Law and the Elderly recommended the establishment of the Office of Public Guardian which would publish detailed guidance on the keeping of adequate accounts and also recommended at paragraph 3.37 that the donor might nominate another person to receive accounts, or that the proposed Office of the Public Guardian should nominate such a person.

52. No Office of Public Guardian yet exists and no court, such as the Court of Protection that exists in English Law, exists for the protection of vulnerable adults. The role is that of the High Court as set out in s. 12 of the Act of 1996, to which I now turn.

The supervisory power of the High Court

53. Section 12 of the Act confers a general supervisory power on the High Court with respect to registered powers. The power of the Court may be invoked by the donor, the attorney or any other interested party. It is accepted that the applicants, children of the donor, are interested parties for the purposes of the section.

54. The Court has a number of express powers granted by s. 12 as follows:

12.—(1) *Where an instrument has been registered the court shall, on application to it by the donor, the attorney or any other interested party, as the case may be, have the functions set out in subsections (2) to (6).*

(2) The court may—

(a) determine any question as to the meaning or effect of the instrument;

(b) give directions with respect to—

(i) the management or disposal by the attorney of the property and affairs of the donor;

(ii) the rendering of accounts by the attorney and the production of the records kept by the attorney for that purpose;

(iii) the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive, or the payment of additional, remuneration;

(iv) a personal care decision made or to be made by the attorney

(c) require the attorney to furnish information or produce documents or things in his or her possession as attorney;

(d) give any consent or authorisation to act which the attorney would have to obtain from a mentally capable donor;

(e) authorise the attorney to act for the attorney's own benefit or that of other persons than the donor otherwise than in accordance with section 6 (4) and (5) (but subject to any conditions or restrictions contained in the instrument);

(f) where appropriate, relieve the attorney wholly or partly from any liability incurred or which may have been incurred on account of a breach of duty as attorney.

(3) On application on notice to the attorney made for the purpose by or on behalf of the donor, the court shall confirm the revocation of the power if satisfied that the donor has done whatever is necessary in law to effect an express revocation of the power and was mentally capable of revoking a power of attorney at the time of the purported revocation.

(4) The court may cancel the registration of an instrument in any of the following circumstances, that is to say—

(a) on confirming the revocation of the power under subsection(3) or consenting to a disclaimer under section 11 (1) (b);

(b) on giving a direction revoking the power on exercising any of its powers under the Lunacy Regulation (Ireland) Act, 1871 ;

(c) on being satisfied that the donor is and is likely to remain mentally capable;

(d) on being satisfied that the power has ceased to be in force by the death or adjudication in bankruptcy of the donor or by virtue of subsection (7) or (9) of section 5 or by the death or mental incapacity of the attorney or by

virtue of section 5 (6);

(e) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected;

(f) on being satisfied that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney;

(g) on being satisfied that fraud or undue pressure was used to induce the donor to create the power; or

(h) for any other good and sufficient reason

(5) Where the court cancels the registration of an instrument on being satisfied of the matters specified in paragraph (f) or (g) of subsection (4) it shall by order revoke the power created by the instrument.

(6) On the cancellation of the registration of an instrument under subsection (4) (other than paragraph (c)) the instrument shall be delivered up to be cancelled, unless the court otherwise directs.

55. The power of the Court includes the power to give directions including directions with regard to the rendering of accounts, the production of records, but the Court also has a power to require the attorney to furnish information or produce documents.

The power to scrutinise: when does it arise?

56. The High Court has various powers under s. 12 and those powers are wide and far reaching. The power of the Court is not merely to give directions, which could suggest a less than fulsome engagement with the day to day management of the affairs of the donor, but also to require the attorneys to furnish information or produce documents. There is no limitation on the documents or information that may be required and no limitation on the type of directions that the Court may give

57. While the legislation does place an obligation on an attorney to keep accounts there is no obligation or procedure for the filing of these accounts or the inspection of these accounts by any body or person. To impose a requirement of strict accounting, or that accounts be prepared in a particular form or that accounts be audited might be burdensome on the attorney in many cases and would impose significant expenses and limit the donor's available property and income accordingly. This could seem to be not merely unduly onerous but not consistent with the scheme of the legislation which was intended to allow the nomination of an attorney who would take over the management of the donor's affairs on his or her being or becoming incapable, without an obligation on them to account in respect of each and every payment made or monies received.

58. The power of the Court to require the furnishing of accounts must be seen in the context of the obligation to keep, but not file, accounts. Accounts are required to be kept and can be directed to be furnished to the High Court for its scrutiny. The scrutiny however is the scrutiny of the High Court, and not of any third party for the reasons I now outline.

59. The question arises as what the purpose or intent of the Oireachtas was in giving the power to the High Court vested in it by virtue of s. 12. The Court could arguably be said to be in the position of the donor of the power had the power been an ordinary power and the donor been capable of calling for an account. The whole purpose of requiring an attorney to keep accounts must be to enable the donor at any time to call for sight of those accounts and for explanation as to dealings on the account. The donor may under s. 12 ask the Court to give directions including directions with regard to the keeping of, or clarification of any matters on, accounts, but the donor of an enduring power of attorney, once the power is registered, will almost invariably be incapable of calling upon the attorney to account, as it is the donor's incapacity that gives rise to the registration in the first place. One could say that the High Court takes the role as donor or principal in the relationship and has the same degree of entitlement or control as the donor himself would have. That seems to me to be a rational approach to the interpretation of the legislation.

60. However it does not seem to be that the "interested parties" as defined by the legislation could themselves be said to have the same power or role or entitlement as the donor, or as the High Court, taking the place of the donor, for purposes of requiring an account. The interested parties have *locus standi* in one context only; they have standing to make application to the High Court. The jurisdiction of the Court is broad and the Court may give directions, but the interested parties may not themselves require information, may not themselves require an account to be given to them, and may not direct the class of orders that the Court can make. What the interested parties can do is trigger a query or concern that gives rise to the court exercising its jurisdiction.

61. Any other interpretation of s.12, or indeed of the enduring power and the purpose for which it is established, would lead to an absurdity and would give the interested parties in essence the same power or role as the donor himself. That cannot have been the intention of the donor, it cannot and was not in my view the purpose of intent of the Instrument executed by the donor, nor can such a role be interpreted as arising from the legislation.

62. No obligation to file accounts is expressed in the legislation and one cannot in my view be implied as a matter of statutory interpretation from the existing scheme. There is nothing in the legislation that enables me to hold as a matter of law that an attorney must file accounts with the High Court, and therefore I interpret the High Court's role as one that arises by way of a default position where cause has been shown that gives rise to concern on the part of the court.

63. The English Courts have considered the role of the Court of Protection under its equivalent section of the Enduring Powers of Attorney Act 1985 in *Re. C (Power of Attorney)* [2000] 2 FLR 1. This seems to be the only judicial authority either in Ireland or England on the extent of the court's supervisory role, and the tests that the court should apply. That case involved an instrument creating an enduring power of attorney executed by a donor in favour of a woman with whom he had been living for many years, and an old friend and business associate. The application was made on behalf of the son of the donor who opposed registration of the power on the basis that his father did not have the capacity to grant the power when he made it. The power was ordered to be registered but the Court imposed certain conditions including preparation by a chartered accountant of a report investigating all transactions over the sum of €25,000, but expressly provided that this report be solely for the use and consideration of the Court of Protection and the attorneys themselves. The son sought disclosure of the report and the application came before the Court by way of an application for directions by the attorneys.

64. On relevance to the matter before me is the conclusion of the Court of Protection which refused disclosure of the report, stating that to order disclosure would have led to further investigations, and that it would have an effect of furthering the divisions in the family. Jacob J. noted that there was "*nothing on the face of the report to suggest there is anything wrong with these transactions*"

and made the following comment:-

"Whilst, of course, one cannot say from the report that there is not behind the report something untoward, it is a pure matter of speculation whether there is or not. I can see no reason why the family should be allowed to indulge in that speculation to the distress of the patient."

65. The Court of Protection sought the benefit of a report to satisfy itself of matters that had been raised in the course of argument, *inter alia*, whether the donor had sufficient assets to provide for his comfort and maintenance in his remaining years, and that there had been no transaction between the donor and either of the attorneys which were either unidentified or unexplained. The judge took the view that no useful purpose would be served in ordering disclosure of that report to an outsider. The Court of Appeal upheld the decision of the Court of Protection.

66. Counsel for the respondent relies on that case as authority for the proposition that the Court ought not to direct any further production of accounts in this case in the absence of any matter of concern, and that the Court should require accounting only when it was reasonable to do so. It is argued by counsel for the applicants that *Re C. (Power of Attorney)* is not authority for the proposition that the power of the Court is fettered under s. 12.

67. I accept the applicants' counsel's argument, but I am also of the view that the judgment of the Court of Protection in *Re. C* does offer some insight into the extent to which the Court will require an account to be made to it with regard to certain transactions which it regarded that it had the power to scrutinise.

68. One feature of the English legislation not found in the Irish legislation is that the court may impose conditions and give directions on a contested hearing for registration. Under the Act of 1996 the High Court can either grant or refuse registration and has no inherent power to grant a limited or conditional form of registration, or to impose conditions upon the attorney following registration. The English legislation imports some tendency towards registration or recognition of a power, albeit that certain conditions may be imposed for its proper exercise. Such a predisposition towards the power would of course be consistent with the perceived policy of the legislation in both jurisdictions, that is to give to the donor power to appoint a person to take care of his or her affairs in the event of incapacity, and the impetus to register is no more than a reflection of the court's willingness to give effect to those wishes.

69. However, even without such express statutory power or impetus in favour of registration, albeit with conditions, the Irish legislation must be seen as the recognition by the Oireachtas of the desirability of giving a power of management and administration to a person of the donor's choice and accordingly the Oireachtas implicitly respects that choice.

70. There is a public interest in achieving a degree of transparency in the operation of an enduring power of attorney. The public has an interest in having available to it a statutory, easily understood and cost effective means of respecting the interests and rights of persons who have become incapacitated, including an interest in respecting that person's wishes as expressed before the incapacity occurred. Were the duty that arises in an attorney to be so oppressive as to amount to a form of trust, or to be so oppressive as to require expenditure in for example the engagement of a forensic accountant, or an auditor as the case may be, then the legislation would fail to achieve the purpose for which it is established and in that regard it must be noted that the legislation is broadly speaking in the form recommended by the Law Reform Commission in its Report in 1989. The purpose to a large extent was to avoid day to day involvement of a court as is found in wardship, and to avoid unnecessary and expensive wardship applications where the affairs of a person who has become incapable may fairly and properly be dealt with by a person that he or she trusted and entrusted with that role.

71. I am conscious of the differing forces that exist between the supervisory role of the High Court which is contained in s. 12, the degree of scrutiny that the Court will exercise, and the object and intent of the legislation that the wishes and directions of the donor be respected, and that his or her chosen substitute or alternative decision making nominee be respected. These conflicting demands may properly be resolved in my view by interpreting the role of the Court as one to require explanation or to give directions only when it can be reasonably be said that a need has been shown to do this, or when the Court has a suspicion or has reason to enquire, and would not be a routine matter.

Conclusion on the exercise of its power by the Court

72. The Court's powers are set out in s. 12 of the Act of 1996 and it ought to be noted at the outset that the Court's power is not one described as being exercisable by it of its own motion, and the Court has the statutory functions vested in it only on application by either the donor, the attorney or any other interested party, as defined in the legislation. The relevant power is that contained at s. 12(2)(c), which enables the Court to require the attorney to furnish information or produce documents or things in his or her possession as attorney, and under s. 12(2)(b)(ii) can mandate the rendering of accounts by the attorney and the production of records kept by the attorney for that purpose. The powers of the Court arise in other contexts not relevant to this application, and the Court may *inter alia*, give consent on authorisation to the attorney to do or take certain acts or decisions, or interpret the extent of the attorney's power or any other matter of construction with regard to the instrument itself. It seems to me that the Oireachtas intended the power of the Court to be exercisable without limitation, but equally to place an onus on an applicant to show some reason why the matter comes before the Court. An application under s. 12 would to that extent have to be focused in that it would either seek directions as to a certain matter or ask the Court to require that certain things be done. This would suggest that for the Court to enter upon an application some basis on which the Court's interference is warranted would need to be set out by the moving party. While the Court clearly has no general supervisory power under the statute, it seems to me that the Oireachtas intended the power of the Court to be constrained to some extent by a requirement that some cause be shown to it that would require its intervention, and although this does not seem to me to exactly import the test as outlined in *Re. C*, it does suggest that there must be at least stateable or arguable grounds for the Court to interfere, or impose requirements or seek information or clarification with regards to certain matters concerning the donor.

73. In that regard it seems to me that certain matters might give rise to concern by the Court sufficient to require it to intervene under s. 12. By way of example it seems to me that the following class of concerns would be likely be sufficient:

- a) Evidence that there has been some departure from a previous manner of dealing with the donor's financial affairs.
- b) Evidence that there has been a change in the manner in which monies are held, for example, if it could be shown that the donor has in the past operated sole bank accounts in which his or her monies were not intermingled with those of another, and that that pattern of dealing had changed in a way that made it more difficult to understand the source or expenditure of funds.
- c) A change in the pattern of expenditure of monies, other than one which is explained by the increasing need for nursing

care or inpatient nursing home costs.

- d) A change in the value or extent of the business affairs of the donor, other than one arising in the normal course of the fluctuations in the market.
- e) A concern reasonably held by an applicant that the funds of the donor are on current patterns of expenditure likely not to be sufficient to meet his or her ongoing care needs.
- f) A change in residence other than one reasonably explicable by virtue of the physical or mental frailty of the donor.
- g) Evidence of the forgiveness of liabilities which could be regarded as other than prudent in the context of the financial affairs of the creditor, or which might have arisen in favour of a close relative or associate of the donee of the power.
- h) A sale of property when it could arguably be stated that such sale was at an undervalue or to a person related to or a business associate of the attorney.

This list is not intended to be exhaustive, but is to illustrate the class of difficulty which if highlighted in an application before the Court would be likely to lead to the Court to seek further information from the attorney or to give him or her further directions. Thus the duty to account would seem to arise by virtue of a departure from previous well established patterns of dealing by the donor, or by virtue of a perceived financial crisis or loss that might arise as a result of dealings by the attorney.

Directions on application:

74. The instrument creating the power is the starting point of any analysis as to its meaning and the functions vested in the attorney thereby. The donor made a general power which expressly granted to his chosen attorneys the power to make decisions as if they were his decisions, those persons being nominated by him as being his alternative or substitute decision makers. He could have limited or restricted the powers of his chosen attorneys but he chose not to do so.

75. It seems to me that the applicants are not correct as a matter of law insofar as they suggest that merely by being "kept in the dark" they have raised a sufficient query to trigger the interference by the Court. The donor of this power did not expressly direct consultation with them or any of them for the taking by his attorneys of any decision, and such could not in the circumstances be implied into the express terms of the instrument by me. However, the applicants have raised certain matters in the course of the affidavit evidence before me that do give rise to at least an arguable ground that requires either directions from or the assistance of the Court. As indicated already in this judgment it was suggested by counsel, and I agreed, that this judgment would focus on the general requirement to account, and the general nature of the power of attorney, in the hope that the parties would resolve the issues arising between them without expensive litigation, and expensive interrogation of their respective financial advisors. Certain matters do in my view require at least further inquiry or investigation and the following matters in particular do arise:

- a) The payment of a director's salary to the attorney in her role as director of one of the property holding companies in circumstances where in the past no director's remuneration was paid by the company.
- b) No information is available as to the administration of the estate of the late G.F., the deceased wife of the donor and one of the joint attorneys.
- c) Information is required in relation to the property in Cannes, its current value, whether the donor is likely to be in a position to continue to enjoy that property, and the feasibility of retaining it in the circumstances..
- d) It is apparent from the replying affidavit of the respondent that as late as July 2014, several months after her mother died, and three years after the power was registered, she had still not completed what she described as a statement of the donor's current assets, liabilities, income and expenditure. She has clearly not kept accounts in any real sense, and is required by law to do so.
- e) No information is available to enable me to ascertain whether the current level of expenditure is sustainable and whether it is likely that the funds and ongoing income of the donor will at current expenditure likely be sufficient to meet his needs into the future. This is a critical question and notwithstanding that the donor has significant assets, and that one could expect in those circumstances that his income and assets would support a high standard of living, including frequent holidays, meals out and 24 hour nursing care in his own home, it is imperative that the attorney be in a position to confirm that she understand sufficiently the assets and liabilities of her father, the extent to which his income is sufficient to maintain the standard of living and level of expenditure now being incurred, and whether the current level of expenditure is sustainable.

76. Thus it seems to me that certain matters have been validly raised by the applicants, albeit the application as first presented to the Court was primarily based on a view which I believe to be incorrect, that the attorney was not entitled to keep the other children of the donor "in the dark" with regard to his financial affairs. The queries raised in the affidavit of the accountant employed by the applicants would be appropriate were his function to carry out a full forensic examination of the affairs of the donor. That does not seem to me to be the test for the Court, but I am of the view that the attorney does have an obligation, having regard to the matters as they have evolved, to furnish to the Court a report from her accountant which should at the minimum set out the following:

- a) Details including valuations of the assets currently held by the donor.
- b) Details including valuations of the estate of her late mother, the other attorney, insofar as these did not pass by survivorship.
- c) Details of the income of the donor and the amount of tax paid, such details to be given for the years 2013-2014.
- d) An analysis of the expenditure incurred in the years 2012, 2013 and 2014. The purpose of requiring three years is in order that the Court can understand the extent to which the pattern of expenditure has changed between the end of 2013 when the co-attorney died and the end of 2014.
- e) Precise details of the nursing and other medical expenses of the applicant in the past 12 months.

f) Projected income for the year 2015, and the basis of the projection. The purpose of this projection is to understand whether the anticipated expenditure on nursing and medical bills is likely to be met from the projected income.

g) The current position with regard to the property in France, its valuation, the cost of the ongoing maintenance of that property including tax and ordinary maintenance.

General

77. This judgment is not intended to be an exhaustive examination of the documentation furnished to me nor of the accounts and other financial information exhibited in the various affidavits. It is hoped that the parties will now be in a position to resolve the issues raised in these proceedings without further recourse to the Court, bearing in mind the ongoing care and medical needs of the donor and the extent of his assets, liabilities, projected income and projected expenses.