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

BETWEEN

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

APPLICANTS

AND

F.F.

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 16th day of July, 2015

1. This judgment arises from events that occurred after I delivered a judgment on the 20th February, 2015 in an application brought by some of the adult children of the donor of a registered enduring power of attorney: [2014] IEHC 142.

2. The application in respect of which the judgment of the 20th February, 2015 was delivered arose from what might be briefly be described as the concerns of some of the adult children of the donor that they were being "kept in the dark" by the attorney with regard to the affairs of the donor, and from a concern in particular expressed by them that the attorney had expended the resources of the donor in a way that it made them fearful that his resources would not be sufficient to meet his anticipated long term care needs.

3. As a result of the conclusion I came to in that case, I considered that certain matters raised by the applicants did warrant further enquiry by the Court and, following an exchange of submissions from counsel, a report was prepared by Shaw McClung, partner in Barr Pomeroy Chartered Accountants dated the 2nd June, 2015. The report ran to 39 pages and contained 14 appendices. The report was then presented to the Court for my consideration.

4. The applicants have now sought that I would release this report to them and this judgment is given in response to that application.

5. Counsel for the applicants argues that as the applicants are the children of the donor they are entitled to have their minds put at ease with regard to the management of the financial affairs of their father. They identify a number of individual matters in respect of which they have concern, most of which were identified in the course of the substantive hearing before them. By way of example they note the fact that the attorney is known to receive a relatively modest, but nonetheless significant, income from the company which is the primary source of the income of the donor. They also raise questions with regard to the title to a substantial villa in the south of France formerly held in the joint names of the donor and his now deceased wife. They note that he is seriously ill and assert that his resources are required to be carefully monitored and husbanded in order to ensure that his future financial needs are met.

6. The applicants also point to the fact that they might themselves have an interest in the estate of the donor either under his will, or on intestacy or arising under s. 71 of the Succession Act 1965, and that in that context their interest ought to be protected now by full disclosure of the report of the forensic accountant, and that although their interest in the estate of the donor is not a vested right, the Court ought still to recognise the importance of these rights by ensuring that the estate of the donor is adequately protected from unnecessary expenditure.

7. Finally, counsel makes an argument that s. 12 of the Powers of Attorney Act 1996 (the "Act of 1996"), which gives to the Court a power to *inter alia* give directions with regard to the management or disposal by the attorney of the property and affairs of the donor, or the rendering of accounts by the attorney, implicitly recognises that such disclosure may be made to them.

8. Counsel for the attorney argues that the instrument executed by the attorney, in the form of a general and unrestricted power of attorney for the purposes of s. 5(1) of the Act of 1996, itself mandated that notice of the execution of the power be given to two named persons, neither of whom is an applicant in these proceedings, and that the attorney is vested with a power to make decisions on behalf of the donor without limitation and without any requirement of notification to the applicants. He makes the point that the instrument contains not merely the wishes of the donor as to how his financial affairs are to be managed, but his directions. Finally, counsel points to the fact that the supervisory role identified in the statue, and explained in the substantive judgment, is the power of the court, and that the role of the applicants as "interested parties", which I have already determined them to be, is to trigger in certain cases an inquiry of the court.

Discussion

9. I consider that counsel for the attorney is correct, and that the instrument creating the enduring power of attorney executed by C.M. has vested in his attorney, she being the surviving of two attorneys named by him in the instrument, to act with general power on his behalf, and without restriction or requirement of notification. I have held in the substantive judgment that this has the practical effect that the children of the donor may effectively be "kept in the dark" with regard to the management of his financial affairs, and that their power to engage with that management is a power to seek directions or the assistance of the court in certain circumstances.

10. I have already held that the applicants were justified in bringing some of their concerns to the Court, and the result of their application has been to trigger an inquiry and process under s. 12 of the Act of 1996. I consider however that the role thereby triggered is a supervisory role of the court, and the court becomes as I described in para. 59 of the substantive judgment the "*principal in the relationship and has the same degree of entitlement or control as the donor himself would have*."

11. Thus I consider that the supervisory jurisdiction of the High Court which has been triggered in this case is a jurisdiction which may be exercised by it without requiring or demanding that the report prepared as a result of the questions raised by me in the substantive judgment be furnished to the applicants, albeit that the applicants are properly characterised as "interested parties" for the purposes of triggering this inquiry.

12. To consider otherwise would, it seems to me, ignore the purpose and function of the enduring power of attorney, and ignore the fact that the instrument creating the enduring power in this case gave unrestricted authority to the donee of the power to act with full authority on behalf of the donor. Further, the instrument is, as counsel for the attorney asserts, an instrument by which directions are given to the attorney with regard to the management of the financial affairs of the donor. The legislation had at its purpose the recognition of the autonomy of a person to choose another person or persons to take the role of attorney after the donor had become mentally incapable. The legislation which thus recognised the autonomous decision-making of the donor of the power, equally recognised the right of the donor to restrict the authority of the attorney. The restriction can take a number of forms under the legislation, but the relevant restriction which guides my decision in the instant case is the express provision in the statutory form of the instrument by which a power is created that permits a donor to identify persons who must be notified before the happening of certain events.

13. The donor of this power did not expressly by his direction mandate any involvement of the applicants in the decision-making powers of the attorneys appointed by him in the instrument. For the Court now to permit them to have sight of the report prepared as a result of the inquiry now conducted would be to fail to recognise this fact, and thereby to fail to give effect to the instrument creating the power.

14. Furthermore, I am persuaded of the correctness of this approach by the decision of the English Court of Protection in *Re C. (Power of Attorney)* [2000] 2 FLR 1 to which I referred in my judgment. Jacob J. refused to allow disclosure of a report saying that he could:-

> *"see no reason why the family should be allowed to indulge in that speculation to the distress of the patient."*

The public administration of justice

15. Counsel for the applicants made a further point, namely that the administration of justice requires that disclosure be made to the applicants of the analysis directed to be carried out on behalf of the Court under s. 12 of the Act of 1996. The general proposition for which he contends can scarcely be controversial, and this it seems to me correct in those circumstances that having directed further information and inquiry on a number of matters, I should indicate in open court my views on the results of that inquiry and I turn now to do so. Before doing that, I consider that counsel for the applicants is incorrect insofar as he suggests that they are persons engaged in inter partes litigation in respect of which they have rights. Their application was made in the context of a particular statutory scheme, and they were afforded full rights in the conduct of that inquiry. This stage of the process is one, if it is to be characterised as inquisitorial at all, by which the Court on behalf of the donor seeks an account of certain matters from the attorney. The applicants have no further interest that requires to be protected by due process.

Conclusion on report

16. The primary focus of my judgment in the substantive case was a concern with regard to whether the current rate of expenditure by the attorney on the needs of the donor, and other expenditure incurred by her which might be described as discretionary, might raise a concern that the donor's future financial needs mighty not be met. Having read the report I am absolutely satisfied that there is no such concern, that the donor has ample resources which could not, bar a major financial crash of a type far more extreme that the financial crisis which commenced in 2008, be insufficient to meet his anticipated needs or even more remote needs. The resources of the donor are ample, and I consider that the evidence points to them being more than sufficient for his needs, and even for a very considerable degree of discretionary expenditure on his behalf. Indeed it would seem clear to me that capital resources of the donor are scarcely being employed in the current levels expenditure.

17. Further, I am satisfied having considered the evidence and comparatives contained in the report that the salary currently derived by the attorney from the company is justified, is made to her on a legally sound basis, and is neither excessive nor exceptional.

18. Thus I conclude that the financial affairs and property of the donor is being managed on his behalf in a satisfactory manner and raises no further concerns in the Court.

Conclusion

19. In the course of the earlier hearings before me, and this is reflected in my judgment in the substantive case, it appeared that the attorney had not kept accounts. I am now informed that this is incorrect and that she did keep accounts and details of expenditure, but that she instructed her lawyers that she had not kept accounts as she incorrectly believed that their inquiry related to formal accounts maintained by an accountant, or in a form akin to such. I am informed in fact that she can fully account for past and current expenditure on behalf of the donor, and that she kept a documentary record of this and retains receipts and other documentary evidence of this expenditure.

20. I consider that the applicants are not entitled to sight of the report, and they may be satisfied as a result of my inquiry that their concerns with regard to their father's financial affairs are not bourne out by the facts.