

**IN THE MATTER OF THE POWERS OF ATTORNEY ACT 1996 AND IN THE MATTER OF AN APPLICATION FOR REGISTRATION OF AN
ENDURING POWER OF ATTORNEY OF R. W. DATED 20th JULY, 2012**

BETWEEN

M. L.

APPLICANT

AND

D.W. (OTHERWISE D.B.)

RESPONDENT

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 8th day of April 2016

Introduction

1. Mr. D.W., otherwise D.B. (the Objector), objects to the registration of an Enduring Power of Attorney made on 20th July 2012 by his mother Mrs. R.W. (the Donor). The Objector is a son of the Donor. The applicant, M. L.(the Attorney), is the Donor's daughter who was appointed Attorney under the Enduring Power of Attorney. The objection is made pursuant to the provisions of s. 10 of the Powers of Attorney Act 1996 (the Act).

Facts

2. The Donor is in her 85th year. She has three children. The Attorney is her only daughter. The Objector is her youngest child. Her other son, T.W. gave evidence before me and fully supports his sister, the Attorney, in all that she has done, both in looking after the Donor over the years and in her endeavour to have the Enduring Power of Attorney registered. T.W. and the Objector are not on good terms and have not spoken to each other for the last eight years.

3. The Donor owns a house in Dublin which she purchased from the local authority many years ago. She resided there until she was no longer able to do so for health reasons.

4. In 2006, the Donor had a stroke. She was hospitalised for a number of weeks. Upon discharge from hospital, she went to live for a time with the Attorney and her family, but after some time returned to live in her own home in Dublin. From 2006 onwards, the Attorney was heavily involved in looking after her mother. She regularly visited the Donor in her home, did her shopping, brought her to hospital and medical consultations and looked after her affairs generally. I am satisfied that there was a close and warm relationship between the Donor and the Attorney and that from 2006 onwards the Attorney looked after her mother very well. I am fortified in that view by the evidence given by T. W. who spoke eloquently of the role played by the Attorney. Indeed, the Objector did not dissent in any way from that view and accepted that his sister had looked after his mother very well.

5. Up to the time of her stroke in 2006, the Donor did not have a bank account. She carried substantial sums of money on her person and had been the victim of a robbery on one occasion. Following her stroke, it was agreed between her and the Attorney that a joint account would be opened in their respective names to which the Donor could lodge money and the Attorney could look after her financial affairs.

6. The Donor recovered reasonably well from her stroke and was able to resume to a great extent her normal living pattern. One feature of her life was that she would go into Dublin city centre on a Friday, collect her pension at the General Post Office, meet her granddaughter for lunch and then go and visit her sister in a Dublin suburb. In 2012, an incident occurred when the Donor failed to turn up to her sister's house at the usual time in accordance with her normal practice. Her sister became somewhat alarmed at this. The Attorney was not so concerned because she knew her mother well and when she was told that her mother was delayed because of engaging in a lengthy conversation with somebody whom she met in the city centre she was not altogether surprised.

7. The Objector took a rather more serious view of this incident and insisted that the Donor be examined by a consultant physician in geriatric medicine. The Donor was seen by Dr. M. for assessment by him of what he described as an "emerging dementia process". Dr. M. advised that consideration should be given to the execution of an enduring power of attorney sooner rather than later.

8. I am satisfied that Dr. M. would not have given that advice if he had any serious doubts about the mental capacity of the Donor to execute such a document at that time.

9. In any event, Dr. M's advice was taken and on 20th July 2012, the Donor created the Enduring Power of Attorney. She also executed a General Power of Attorney pursuant to s. 16 of the Act on the same day.

10. The Enduring Power of Attorney created on 20th July 2012 was, I am satisfied, executed in an entirely regular way. It was properly executed. It contained a duly completed statement by the solicitor to the effect that, having interviewed the Donor, she was satisfied that the Donor understood the effect of creating the Enduring Power and had no reason to believe that the document was being executed by the Donor as a result of fraud or undue pressure. I am also satisfied that the General Power of Attorney was properly executed by the Donor who understood what she was doing.

11. In addition, the Enduring Power of Attorney contained a statement from a registered medical practitioner stating her opinion that at the time the document was executed by the Donor, she, (the Donor), had the mental capacity, with the assistance of such explanations as may have been given to her, to understand the effect of creating the power.

12. I find that the Donor fully understood what she was doing at the time she executed the Enduring Power of Attorney and that she had the mental capacity to do so. I make these findings because at one stage, the Objector alleged that the Donor did not understand what it was that she had signed and that she was coerced into signing the document by the Attorney. This line of objection was not ultimately pursued, and in fact was specifically withdrawn at the hearing. In such circumstances, it was indeed

unfortunate that the Objector, during the course of his testimony, returned to it and alleged that the General Practitioner's certificate was one which was given to "accommodate the family". In fairness to him, he subsequently withdrew that allegation, but it is one which should not have been made and there was no evidence to support it.

13. A good deal of tension existed in the relationship between the Objector and the Attorney since the events of 2012. In 2014, a bona fide attempt was made to effect a reconciliation when the Objector invited the Attorney to dinner. That attempt was reasonably successful, but unfortunately, subsequent events have reanimated the rift in the relationship which is in part, at least, responsible for the unhappy situation which exists today.

14. In February 2015, the Donor was admitted to hospital suffering from pancreatitis. Having recovered from that condition, it became necessary for her to move into nursing home care, and since June 2015 she has been permanently resident at a nursing home in County Louth. In common with many elderly people, I am satisfied that the Donor had no desire to ever move into a nursing home, but it became necessary to do so since she was no longer in a position to look after herself in her home in Dublin, particularly in circumstances where none of her family now live in Dublin.

Objection

15. In September 2015, the Objector instructed his solicitor to write to the Attorney complaining of the way in which she was handling the Donor's affairs. The letter read as follows:

"Dear Ms. L.,

I have been asked to write to you for and on behalf of your brother, D.B., with reference to Mrs. R.W.

I understand from my client that Mrs. W. is at present in a nursing home in County Louth, and that you appointed yourself as Attorney on foot of an Enduring Power of Attorney some time in the summer of 2013.

I am aware that my client is one of the noticed (sic) parties as is his brother, T.W.

My client has serious issues concerning your handling of his mother's affairs and I am advised that the family home has been put on the Internet through Flynn & Associates Auctioneers, Raheny, Dublin 5, for the purpose of sale.

I am instructed by my client that no notice of intention to apply for registration of the Enduring Power of Attorney has been served on my client (as one of the noticed (sic) parties) which is a prerequisite to having the Enduring Power of Attorney sealed and enrolled in the High Court.

In any event, the purpose of this letter is to formally put you on notice that my client will be objecting to any application to implement the Enduring Power of Attorney, and more importantly to dispose of Mrs. W's family home.

The purpose of this letter is to formally put you on notice that I require confirmation from you within 7 days that you will withdraw the property from sale and undertake to have the notice removed from any website/Internet and you will so instruct Flynn & Associates Auctioneers in this respect.

It is unclear as to which solicitor has been retained with reference to the Enduring Power of Attorney.

I understand from my client that Ms. G, solicitor, was the family solicitor, but at present you may be dealing with a Mr. F. S. Quite naturally, a copy of this letter has been furnished to them.

You can take this letter as my client's formal objection to having the Power of Attorney sealed and enrolled in the High Court.

My client instructs me that in a conversation with your good self he indicated that he is quite happy to take his mother and look after her in his family home at County K. and he is also aware that it is your mother's wishes that the family home would not be disposed of.

In those circumstances, I await hearing from you."

16. It was indeed true that the Attorney had taken steps to sell the Donor's family home. She did so in circumstances where the house was vacant, where outgoings such as insurance, property tax, electricity and gas bills had to be met and where the house had been broken into. In addition, she was of the view that the proceeds of sale were required for the purpose of funding the Donor's care because there was a shortfall of approximately €1,000 per month in relation to that. She says that she put the house up for sale with the knowledge and agreement of the Donor to the extent that she was in a position to understand and agree to it. Whilst the Donor was sad at the thought of selling her home, she, it is said, understood the reasons and was agreeable to it. The Attorney believes that she kept family members, including the Objector, informed as best she could.

17. The reason why the solicitors named in the Objector's letter of September 2015 were chosen rather than the normal family solicitors was to save costs.

18. In any event, following the objection the house was withdrawn from the market.

19. Meanwhile, the Donor was resident in the nursing home. Because of her hospitalisation early in 2015, she was unable to attend her annual appointment with Dr. M. Ultimately, she attended with him in September 2015.

20. Following that appointment, Dr. M wrote to the Donor's solicitor in the following terms:

"Thank you for your letter of 17-09 2015 concerning Mrs. R.W. and an Enduring Power of Attorney. Ms. W. first attended my clinic in 2012. She was referred to me at that time for assessment of an emerging dementia process. When I saw her last, on 9th September 2015, Ms. W. had evidence of severe cognitive impairment with an MMSE (Mini Mental State Examination – a standardised clinical tool used for the assessment of cognition in older people) score of 17 over 30. In addition to this, tests related to executive function were very impaired. Her diagnosis is Alzheimer's Dementia.

Because of this, it is my opinion that Ms. W's condition should be considered to be permanent, irreversible and

progressive. It is also my opinion that Ms. W, because of her dementia syndrome, is now incapable of managing any/all of her personal or financial affairs. It is further my opinion that the Enduring Power of Attorney should now be registered and enacted."

21. Within days of receipt of the medical report from Dr. M, steps were taken to register the Enduring Power of Attorney. No criticism was or could be made of any tardiness on the part of the Attorney in so doing.

22. Under cover of a letter of 4th November 2015, the Objector set out his objections to the registration of the Enduring Power of Attorney. That notice included objections on the basis of alleged invalidity of the Enduring Power of Attorney and unsuitability of the Attorney for that office. Subsequently, on 27th November 2015, a Form No. 4 Notice of Objection was received which confined itself to an allegation of unsuitability on the part of the Attorney. Later still, on 25th January 2016, a further Form No. 4 Notice of Objection was served. On this occasion, three grounds were advanced. The first was, yet again, an allegation of unsuitability of the Attorney; second, invalidity of the power, and third, that the power created by the Instrument was "no longer a valid and subsisting power".

23. These changes in mind on the part of the Objector, as witnessed in these various Notices of Objection, manifested itself in the witness box in the way in which I have described earlier in this judgment. However, at the hearing, all objections save one were abandoned. The sole objection is as to the suitability of the Attorney. Her alleged unsuitability arises largely from the decision made by her to effect a sale of the Donor's house.

The Sale of the House

24. As I have already indicated, the decision on the part of the Attorney to sell the house was based upon a number of factors. They included the shortfall of approximately €1,000 per month in the nursing home charges for her mother, maintenance and outgoings on the house and the fact that it had been broken into.

25. For his part, the Objector believes that the house should be maintained and let. Failure to adopt this course has a particular consequence for the operation of the Fair Deal Scheme which I will turn to in a moment. The sale of the house will also mean that the single non-cash asset of the Donor, which would be available for distribution between her children on death, will no longer be so. For her part, the Attorney made it clear that that is a matter of no consequence for her whatever may be the position concerning the Objector.

26. The Donor is the beneficiary of the provisions of the Nursing Home Support Scheme Act 2009, commonly called the Fair Deal Scheme. On the evidence before me, there is a shortfall between the cost of the Donor's care and the amount recoverable under that scheme of approximately €1,000 per month. The care costs of the Donor are about €4,000 per month. The scheme covers approximately €2,000 of that cost and further pension entitlements account for another €1,000. The shortfall of €1,000 per month has to be met by the Donor and funds are not currently available to meet her payment obligations. These payment obligations can be met either by selling the house or by letting it. The Attorney has decided that the better course is to sell for the reasons which I have identified whereas the Objector takes the opposite view.

27. A decision to sell has, however, further fiscal implications for the Donor's assets which arise in the following circumstances.

28. By letter of 12th June 2015 from the Health Service Executive, the application for support under the Nursing Home Support Scheme Act 2009 was assessed. The following was the assessment made:

Contribution to Cost of Care Assessment	Total €
80% of Weekly Income (Pensions etc.)	€192.24
7.5% Assessed Weekly Income from Cash Assets	€
7.5% Weekly Contribution from Principal Residence/Farm/Relevant Business (3 Year Cap applies)	€254.11
7.5% Weekly Contribution from Other Relevant Assets	€
Applicant's Assessed Total Weekly Contribution	€446.35

29. The Donor's dwelling house is her only non-cash asset. Pursuant to the scheme, the first €36,000 of a non-cash asset is not included when determining the level of contribution. The 7.5% valuation of the Donor's non-cash asset is included for the first three years of care and has a total cap of 22.5%. The Donor has been in permanent residence in a nursing home since June 2015.

30. The sale of the Donor's house will alter the classification from non-cash asset to cash asset under the scheme. That will remove her entitlement to the 3-year cap. Thus, the non-cash asset becomes a cash asset and therefore it fails to attract the 3-year cap on it. Thus, if the Donor survives for a period beyond June 2018, she will continue to be assessed in respect of her former house which will be a cash asset, something which would not occur after that date were the house to remain as a non-cash asset in her ownership.

31. Can it be said that a decision made by an Attorney to sell the Donor's dwelling house in such circumstances is one which renders her a person unsuitable to act as Attorney?

Section 10

32. Section 10(3) of the Act identifies five grounds which, if established, amount to a valid objection to the registration of an Enduring Power of Attorney. Four of them no longer have any relevance to this case. The only one that is relevant is that set out at s. 10(3)(d), namely, that having regard to all the circumstances, the Attorney is unsuitable to be the Donor's attorney.

33. Such a ground had to be considered by Morris P. *In Re Hamilton* [1999] 3 I.R. 310. In that case, two attorneys were nominated by the donor, namely, her solicitor and her daughter. The donor was deemed incapable of managing her own affairs and the applicants applied for registration of the Enduring Power of Attorney. The donor's son objected to the registration on two grounds. Only the second such ground is relevant from the point of view of this case.

34. In *Hamilton*, it was argued that the applicant had mismanaged the donor's affairs and had dealt with her assets in an unbusinesslike manner thereby failing to realise their true potential. Morris P. dealt with that objection in the following way:

"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 on (sic) 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. In *Arnott v. Arnott* (1924) 58 I.L.T.R. 145, Murnaghan J. approved the guiding principles laid down in *Letterstedt v. Broers* (1884) 9 A.C. 371, when he said at p. 147:-

'Their Lordships in that case, pointed out that if it appeared clear that the continuance of the trustee would be detrimental to the execution of the trusts, if for no other reason than that human infirmity would prevent those beneficially interested from working in harmony with the trustee, ... the court might think it proper to remove him, if, without reasonable ground, he refused to resign the trust.'

Morris P. then recited s. 10 of the Act and said:

"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"

35. I agree with the approach of Morris P.

36. I furthermore agree with the observations of Baker J. concerning the burden of proof on an objector under s. 10 of the Act as set forth in her decision *In Re SCR* [2015] IEHC 308. There, she said:

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

37. In my view, the Objector in this case has fallen far short of demonstrating that the Attorney is unsuitable.

The Decision to Sell

38. In my view, the decision to sell on the part of the Attorney is a perfectly reasonable one in circumstances where the house is uninhabited, has to be maintained, has been broken into twice and has sustained water damage. No member of the family lives near to it and it is a drain on resources. To the extent that a decision to sell will convert the asset into a cash asset (and thereby lose the 22.5% cap provided by the Fair Deal Scheme) will impact on the Attorney, she indicated that she considered the asset to be that of the Donor, and if all of it was to be expended on the Donor's care, then, as she said "so be it".

39. Equally, I do not believe that the Attorney could be criticised if she decided to let the house. That would have the advantage of providing a rental income and would maintain the 22.5% cap. However, as against that, one has to consider the problems that are attendant upon the letting of a residential premises. The provisions of the Residential Tenancies Act 2004 impose obligations which are substantial. There would be a risk of tenants acquiring rights under that Act. The income created would itself be subject to tax and might affect the calculation of the financial needs assessment carried out by the HSE. In addition, there is the continuous problem of managing the asset in the context of perhaps unreliable or difficult tenants.

40. On balance, she has decided to sell rather than let. She has taken account of all relevant factors. That is a perfectly sensible and reasonable course to take.

Conclusion

41. The decision on the part of the Attorney to effect a sale is neither unreasonable, irrational or irresponsible. The fact that the Objector would prefer that the house be let does not make the Attorney's decision unreasonable or irrational or irresponsible. It most certainly does not render her unsuitable to act as Attorney.

42. In these circumstances, I dismiss the objection and direct registration of the Enduring Power of Attorney.