

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 F.B. ON THE 6TH DAY OF AUGUST 2008

BETWEEN

N.B. AND J.B.

APPLICANTS

AND

C.B. AND I.B.

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 6th day of May, 2020

1. Few things seem to have the ability to bring simmering family tensions to the surface more than disputes involving inheritance, distribution of property, and care of parents with declining capacity; and if all factors come together one has the ingredients for a perfect storm of family dysfunction. Adding contested litigation to that mix raises the stakes alarmingly given the potentially significant legal costs thereby generated. Hence (as it happens, unsuccessfully), I encouraged the parties here to try to resolve their differences and with their agreement discussed with them all the various possibilities towards resolution that might hypothetically be open. I do not hold the absence of agreement against anybody, I disregard any options that are not formally before the court and I consider the present application on its merits. In particular I disregard communications between the parties during the currency of the proceedings that were aimed at settlement of the matter, even though not expressed to be without prejudice.
2. Before the court is a notice of motion seeking an order under s. 10 of the Powers of Attorney Act 1996 registering the enduring power in this case. That application has given rise to conflict between the five siblings who are children of the donor. Two of those siblings are the applicants, being the named attorneys. A third sibling, E.B., supports the application; and the other two siblings are the objecting respondents.
3. I was immensely assisted by Mr. Liam O’Connell B.L. for the applicants and by Mr. John Foley, Solicitor, for the respondents, and I would commend both for their excellent and focused cross-examination and submissions. E.B. also addressed the court in person in support of the attorneys. I have considered all the material that was duly submitted including all affidavit and oral evidence and oral submissions of the parties.

Scope of objection

4. Both attorneys are said to be unsuitable. The objection to J.B. seems to be focused on the point that she went along with N.B. (it is suggested, over-trustingly), and did not make her own inquiries, so it is essentially a derivative objection. Mr. Foley submits that both attorneys stand or fall together and that is essentially the correct approach in the circumstances of this case.
5. The separate point of her living outside the State was only faintly pressed, and indeed was not specifically put to her, but such an objection in itself does not amount to a valid ground of unsuitability especially in a globalised modern world. It would be an insular

court indeed that would see that as a disqualifying problem. Doubly so here where J.B. was already living abroad at the time the power was executed.

6. The objection to N.B. is focused exclusively on the decision to sell shares of the donor to fund works in B. House, in which the donor had a right to reside, and on the circumstances surrounding those steps. That decision seems to have been taken in late 2016 and carried into effect with the sale on 30th December, 2016 and to further tranches of sales into 2017. The notices of objection were lodged out of time, but it is not suggested that they are invalid on that basis.

Onus is on the objectors

7. The law is clear that the onus of proof of unsuitability of an attorney is on the objectors: see in *Re S.C.R.* [2015] IEHC 308 (Unreported, High Court, 20th May, 2015), *per* Baker J.; and in *Re W.* [2000] EWCA Civ J1211-1, *per* Arden L.J., as she then was, at para. 47. As the latter put it as Arden J. in *Re E.* [2001] Ch 364 at 377 at para. 32, "*the court has to be satisfied not as to the chosen attorney's suitability, but rather to his unsuitability.*"
8. Ultimately, in the present case the objectors may have laid the basis for directions to be given under s. 12(2) of the 1996 Act, but they have failed to overcome the distinctly higher onus of proof that rests on them to demonstrate the unsuitability of the attorneys. There are a number of independent but mutually reinforcing reasons for that conclusion.

The decision complained of was one by the donor and not the attorneys

9. The first problem for the objectors is that even if the scheme to sell the mother's shares and revamp B. House was a misstep, the mother herself decided to do it, and it has not been established in evidence that she lacked capacity at that time. In the absence of that lack of capacity being positively proved, it was therefore in law a decision not of the attorneys, but of the donor, and thus it cannot be said to render the attorneys unsuitable.

Assessment of witnesses

10. More fundamentally, having seen and heard the applicants and their witnesses and on the other hand having seen and heard the respondents, I broadly reject the evidence of the respondents where it differs from that of the applicants and their witnesses.
11. C.B. in particular came across as a witness with something of an agenda. Clearly, his history is one of providing minimal assistance in relation to the care of the donor and he seems to have also had something of a history of unsuccessfully launching objections from the margins of things within the family. Some of his evidence was contradictory or evasive, and he resiled in evidence from some of the points made on affidavit. He conceded in the witness box that care of the donor by N.B. was excellent.
12. There is clearly a deep family history of conflict here that has erupted through the vehicle of these proceedings. I hope I will be forgiven for saying that one of the stranger features of the case was that C.B. gave evidence that he had recently taken up the study of psychology; but he did not appear to me to be a particularly psychologically-minded witness. It is hard to shake the distinct impression that one of the main purposes of the objection was to ventilate a great quantity of historical family issues.

13. The position of the other objector, I.B., is even more uncomfortable because he went along at the time with the scheme of selling shares to revamp the house which is now the fulcrum of the objection. Sure, one could make a fair argument that the scheme had not been thought through, was a misstep, was not executed in the best way, or indeed as I.B. had said on affidavit, was a poor decision. That is not the point, and that in itself is not a basis to hold an attorney unsuitable.
14. Indeed, I.B. put it very well himself in the witness box by saying that in hindsight he wished he had not agreed to it. That is as may be, but such a formulation involves an explicit acknowledgment that he *did* so agree. However, in his oral evidence, I.B. gave a totally new account of what he was asked to agree to. His evidence was that he was asked to sell the donor's shares to repair the roof of the property. He never gave that account before, and his evidence in that regard was distinctly unimpressive and I reject it. The evidence of Mr. Buckeridge, which I accept, leads to the conclusion that the roof issue only emerged during the works and he was not challenged on that.
15. I.B. sent an email of 8th April, 2019, which was exhibited, in which he sought a payment of €60,000 to himself and his wife, noting that he had agreed to the sale of shares so that the donor would make some use of B. House and that the savings would indirectly benefit her. There is no mention in that email good, bad or indifferent of him having only agreed to works being done on the roof. Later in his oral evidence, he offered yet another version and said that he agreed that N.B. would sell the shares and make the house more comfortable. That involves a further change in his position to the effect that it was not just a question of fixing the roof, but when that contradiction was put to him, he evaded a straight answer to that.

Family hostility is not a basis for a finding of unsuitability

16. There is, as is apparent, considerable family hostility here; but hostility would only render an attorney unsuitable if it would impact adversely on the administration of the estate: see *G.B. v. H.B.* [2016] IEHC 615 (Unreported, High Court, 8th November, 2016), *per* Barr J. at para. 89, and *Re W.* [2000] 1 All E.R. 175. In the present circumstances it will not impact adversely, especially factoring in the possible exercise of the court's power to give directions.

Any missteps on the part of the attorneys do not amount to unsuitability within the meaning of the 1996 Act

17. While N.B.'s management of the personal care of the donor is agreed to be excellent, on the other hand it can be said that a number of aspects of his management of her financial affairs were sub-optimal, something that was in effect conceded in submissions on his behalf, and sensibly so. The law again is clear that lack of competence, as such, is not a ground to hold an attorney to be unsuitable; see *M.L. v. D.W.* [2016] IEHC 164 (Unreported, High Court, 8th April, 2016) *per* Kelly P. at para. 33 onwards, relying on the judgment of Morris P. in *Re. Hamilton* [1999] 3 I.R. 310, to the effect that: "*Lack of business skill is not a valid objection to the registration under s. 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 ... A criticism made on 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 removal for the trustee."

18. In my view any errors or missteps by the attorneys come under the heading of mismanagement, but do not "far exceed" that threshold so as to amount to misconduct.
19. Finally, I should reiterate under this heading that while missteps by the attorneys are not a ground to hold them unsuitable, such actions or omissions may be a basis for making directions under s. 12(2) of the 1996 Act. I appreciate the points made by Baker J. in *A.A. v. F.F.* [2015] IEHC 142 (Unreported, High Court, 20th February, 2015), to the effect that directions (at least generally) are envisaged as being on the application of an interested party rather than on the court's own motion, and that there is an onus on the person seeking directions under s. 12, and I will canvass the views of the parties before making any final order in relation to directions. But of course if directions are given in due course I will take into account all the evidence already received and the findings set out in this judgment.

Acquiescence

20. If I am wrong about all of the foregoing, I would dismiss the objections in any event on the grounds of acquiescence. The objections are centred on the sale of the donor's shares. I.B. agreed to the shares sale at the time, albeit he claimed in retrospect that conditions were attached which he did not articulate at the time. Even assuming that he was not told how many shares were to be sold or how much money was involved in the works, it is also clear he didn't ask. Any objection relating to that transaction cannot properly be launched years later, having agreed the process without making any inquiries whatsoever as to the amount of shares to be sold. In his evidence, he did not seem to see the point that having agreed without articulating conditions or reservations, it was not a reasonable or appropriate posture to retrospectively say that because the donor in the end did not live in the revamped property, that the money having been spent should now be given back. He did, in fairness to him, acknowledge in cross-examination that he did not express his reservations.
21. Turning to C.B., having regard to all the evidence and in particular I.B.'s evidence that he was in regular contact with C.B., it is inconceivable that I.B. did not tell C.B. of this proposed scheme. While he could not put a time on it, I.B. did accept in evidence that he did not wait years to tell C.B., which was C.B.'s position. C.B.'s testimony on this point was evasive, and it seemed to me intentionally so, and I entirely reject his evidence in that regard. I.B. expressly said the discussion on this was probably not later than six months after the proposal, which itself was in late 2016. It could have been a couple of weeks later and they discussed matters relatively frequently. When pressed further in cross-examination on this, I.B. then retreated into a comforting vagueness as to timelines and somewhat contradicted himself in his evidence.

22. Flushing out the contradiction between the evidence of I.B. and C.B. was considerably assisted by I.B. being required to leave the courtroom during C.B.'s evidence. That salutary procedure prevented any dovetailing of evidence, and C.B.'s story of not having any knowledge of this matter until last year and being completely blindsided by it completely crumbled as a result. The conclusion I draw from the totality of the evidence is that C.B. did know, in broad outline, within a matter of weeks, of the proposal to sell the donor's shares in late 2016, and he articulated no objection. It is wholly impermissible for either objector to launch such an objection years later in the context of registration of the enduring power.

Express written consent to J.B.

23. More specifically there is a further problem in that the objectors wrote an expressly open letter dated 22nd January, 2020 accepting that J.B. would be accepted as an attorney subject to their suggestion that she should act jointly with one of the objectors (although this is not a permissible procedure under the 1996 Act, I should clarify). That is not reconcilable with the objection now made, even bearing in mind that this was consent to J.B. as a joint attorney rather than as sole attorney. C.B. said, when confronted with this in the witness box, that all negotiations were without prejudice, but the letter expressly says the offer is open. He then tried to shift the blame on to his solicitor, which was totally unconvincing. The impression from his evidence is that other people normally seem to be to blame in C.B.'s world. A letter of this nature must be taken to have been, and I have no doubt was, written on instructions. The objection to J.B. fails in *limine* where the objector has already accepted the appointment of J.B. in open correspondence.

Medical evidence favours the donor remaining in her present care arrangements

24. The last minute demand, after years of care by N.B. and his wife S.B., that C.B. and I.B. take over the care of the mother and be provided with tens of thousands of euros in order to enable them to do so, especially in the context of a peremptory unilateral announcement that the donor was going to be taken out of her nursing home (until scotched by an interlocutory direction I gave on the applicants' application), is deeply unimpressive. The medical evidence from Dr. Cora McGreevy is clear that on the balance of probabilities the donor is better off where she is, and I will give that direction under s. 12(2) of the 1996 Act, subject to hearing if the parties want to add anything to the previous requests by the applicants for an equivalent direction under s. 8 of the 1996 Act, which was sought prior to the registration of the power. Equally unimpressive is C.B.'s sudden assurance that he will personally fund all financial shortfalls if the mother's assets run out, given that so far he has contributed absolutely nothing financially. Confronted with the contradiction between this conversion to financial support and his previous position of not having paid a cent towards the donor's care, he would only grudgingly concede that he had contributed minimally.

Order

25. The order will therefore be as follows:

- (i) that the enduring power be registered under s. 10 of the 1996 Act given that I find the statutory criteria to have been met; and as far as the minor typographical

errors in the power are concerned, I do not consider that they are such to require invocation of s. 10(5)(b), but in case I am wrong about that I will order that I would rely on subs. (5)(b) if and insofar as it is necessary to do so;

- (ii) subject to hearing the views of the parties, I am provisionally minded, having regard to the findings of fact set out in the judgment and in the evidence received, to direct the attorneys pursuant to s. 12(2) of the 1996 Act along the lines of draft suggested directions to be circulated to the parties' legal representatives;
- (iii) I will adjourn the matter for a short period to give the parties an opportunity to seek to agree whether directions along the foregoing lines are required and, if so, what the wording of those directions shall be.

Postscript - consequential orders - 12th May, 2020

Directions under s. 12(2) of the 1996 Act

26. Having heard the parties further on this issue, by consent I am giving the following directions under s. 12(2) of the 1996 Act:

- (i). the donor to remain resident in S. Nursing Home absent medical emergency;
- (ii). the attorneys to make all outstanding CGT returns within 28 days;
- (iii). all of the donor's income shall be paid into a bank account in her name, out of which all of her living and care expenses and future legal liabilities shall be paid (save and except such care expenses and legal liabilities discharged by the attorneys or either of them in accordance with these directions);
- (iv). the attorneys shall sell the donor's FBD shares and pay the net proceeds thereof into her bank account after deduction of all CGT (arising from the disposal of the FBD shares only) and any other cost or expense arising in connection with the disposal thereof;
- (v). to record N.B.'s undertaking to pay any CGT tax, interest surcharge and penalties charged by and/or payable to the Revenue Commissioners in connection with the disposal of the donor's Glanbia plc shares within 28 days;
- (vi). the attorneys shall not undertake any further dispersal of donor's property save on day-to-day living and care expenses of the donor, gifts of a nominal value (not exceeding €50 in each case) from her to grandchildren and/or her carers on occasions such as birthdays, Christmas and events of religious and/or personal significance to the recipient, and future tax liability of the donor, if any;
- (vii). to record N.B.'s undertaking to discharge:
 - (a). any and all lawful nursing home fees, expenses and charges arising from the care of the donor in a nursing home; and

- (b). the fees, expenses and costs for care provided to the donor by registered carers out of the gross rental income from B. House and to thereafter remit the balance thereof to the donor's bank account during lifetime of the donor;
- (viii). the attorneys to provide their siblings with a written statement setting out lodgements and withdrawals from the donor's account on an annual basis;
- (ix). in addition to the written statement provided by the attorneys, to record N.B.'s undertaking to provide on an annual basis a written statement to his siblings setting out:
 - (a). the gross rent received from B. House;
 - (b). the total amount paid by N.B. in relation to nursing home fees, expenses and charges for the period, with particulars of the said fees, expenses and charges;
 - (c). the total amount paid by N.B. to registered carers caring for the donor during the period; and
 - (d). the balance remitted to the donor's bank account.

Costs

27. Dealing now with the question of costs, I have heard very helpful submissions from both sides. Mr. O'Connell seeks his costs and Mr. Foley suggested there should be no order as to costs.

General rule of costs following the event

28. The starting point is that costs follow the event: *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 775. That is the general default rule anyway and is reinforced by O. 99 of the Rules of the Superior Courts and s. 169 of the Legal Services Regulation Act 2015. Mr. Foley queried whether enduring power of attorney proceedings are "*civil proceedings*" within the meaning of s. 169 and suggested that a separate rule as to costs should apply in the EPA context. He specifically referred to:

- (a). the fact that the Powers of Attorney Act 1996 does not set out rules as to costs of proceedings;
- (b). the fact that the Act provides for parties to be given notice of an intention to register a power and allows them to make objections; and
- (c). a suggested analogy with will suits, relying on *Elliot v. Stamp* [2008] IESC 10, [2008] 3 I.R. 387.

29. In the latter case, Kearns J. (as he then was) referred (at paras. 38 and 39) to the view of Budd J. in *In bonis Morelli: Vella v. Morelli* [1968] I.R. 11 (at pp. 34 – 35) that: "*persons having real and genuine grounds for believing, or even having genuine suspicions, that a purported will is not valid, should be able to have the circumstances surrounding the execution of that will investigated by the court without being completely deterred from taking that course by reason of a fear that, however genuine their case may be, they will have to bear the burden of what may be heavy costs*".

30. Kearns J. concluded that a submission based on *Dunne v. Minister for the Environment*, that costs should follow the event "fails to take account of the fact that a special jurisprudence in relation to costs was developed in this jurisdiction for the reasons so eloquently expressed by Budd J. in *Vella v. Morelli*. It is a departure from that jurisprudence which requires a 'reasoned basis' in a will suit".
31. Firstly, as regards the expression "civil proceedings" in s. 169, in my view that term should be given its ordinary meaning which in this context means non-criminal proceedings. Thus, enduring power of attorney proceedings are in principle civil proceedings. The general rule of costs following the event having been given statutory footing in s. 169 has the effect that that statutory rule must be taken to supersede previous special approaches in particular areas except environmental law, which is expressly provided for in the section. That does not mean that in will suits an unsuccessful objector cannot get their costs, but simply that they do not start with a presumption in their favour.
32. If I am wrong about that and if a special rule in will suits still exists in the sense of a presumption in favour of costs coming out of the estate in the case of genuine allegations that the will is not duly and freely executed, one can certainly say that even if, for the sake of argument, such a special rule remains, it should not be extended beyond its existing narrow bounds having regard to s. 169.
33. If I am wrong about that as well, and if special rules regarding will suit costs exist and were to be extended to cover certain EPA litigation, such an approach could not cover applications that do not relate to analogous questions of validity and undue influence, but relate rather as here to more general matters like suitability of the attorneys; and especially not in cases where, as here, I did not hold that the objection was reasonable and bona fide, but indeed much to the opposite sense that there had been acquiescence and where much of the respondent's evidence was rejected.
34. So whatever way it is viewed, the general rule that costs follow the event must apply here, save to the extent that it can be said to have been shown that there are grounds to displace that default approach.

Calderbank letter

35. The general principle of costs following the event is significantly reinforced here by the fact that the applicants sent a *Calderbank* letter (see *Calderbank v. Calderbank* [1975] 3 All E.R. 333 (EWCA)) on 5th February, 2020 which proposed registration of one out of the two attorneys with the parties going back-to-back on costs. That was a significantly more generous offer than what the applicants actually obtained from the court ultimately, or to put it another way, it was a significantly better offer than the outcome arrived at by the respondents. However, that offer was rejected and a counterproposal made that in addition N.B. would pay €85,000 by way of making good the sum from the Glanbia share sale. So, even if I am completely wrong about the general rule being that costs follow the event in a case such as this, the *Calderbank* letter is a powerful basis for an order in

favour of the applicants thereafter, subject to any consideration of discretionary circumstances.

Discretionary circumstances

36. Mr. Foley's submission that the court retains a discretion is indeed correct, although the court is not at large in that regard. Nonetheless, I do consider all the circumstances of the case and in terms of the discretion that arises therefrom, the following issues arise.
37. Mr. Foley makes much of what he says are the genuine concerns of the respondents, but I dealt with that in the judgment; and any consideration of their posture has to be viewed in the context of the fact that I rejected much of their evidence and held that they had acquiesced to the matters to which they objected in the proceedings. Hence, they are not in the position of reasonable and *bona fide* objectors for present purposes.
38. Mr. O'Connell contended that the mediation which was proposed in this case failed due to the attitude of the respondents but I don't think that (even if I accepted it) adds much to the position that pertains post-the *Calderbank* letter.
39. I do however have regard to the fact that the case became much more urgent due to the high-handed action of the second named respondent threatening to peremptorily and unilaterally remove the donor from her nursing home.
40. Mr. Foley points out that a great deal of specific information only came out at the trial, for example the actual value of the donor's shares that were sold. That is certainly true and falls under the heading of missteps by the attorneys, but it does not mean that full-blown litigation of the type actually undertaken was necessary or appropriate or proportionate.
41. The main thing the respondents have going for them is that certain directions under s. 12(2) of the 1996 Act were ultimately agreed to by both sides having regard to the background of what were essentially conceded to be certain missteps by the attorneys. While the Act is not necessarily framed in the clearest possible way in this regard, it should be interpreted in a flexible and practical manner; as so approached (or even on a purely literal interpretation I might add) it would have been open to the respondents as interested parties to apply for directions without making a formal objection under s. 8 pre-registration or indeed as is less exiguously provided for, under s. 12(2) post-registration.
42. If in the light of all the circumstances one is to depart from full costs to the winner in private law proceedings, the logical way to do so where a losing party achieves a modest benefit, but has failed on the substance, is to ask what the hearing would have looked like had that party taken the appropriate approach and limited themselves to the relevant and pertinent issues or those that could be said to have made headway on. In the present case the contrast is, therefore, between the hearing that actually took place and what would have happened if the objectors had limited themselves to seeking directions: see by analogy (albeit by no means an exact analogy) the approach taken as to costs in relation to the removal of a liquidator, where regard was had to the contrast between the

hearing that actually took place and the time that would have been consumed had an inappropriate objection not been made in *Fitzpatrick v. Gladney* [2018] IECA 103 (Unreported, Peart J. (Irvine and Gilligan JJ. concurring) Court of Appeal, 19th April, 2018) and *Star Elm Frames Ltd & Companies Act 2014* [2016] IEHC 666, [2016] 10 JIC 0313 (Unreported, High Court, 3rd October, 2016).

43. In saying this I should clarify postscriptually that there can be no pretence at any exact measurement of what the costs might have been, and the time expended will have to serve, in the absence of anything more definite, as a very rough and ready proxy for the level of additional costs that were generated by the way the case was actually approached. While this methodology is not in any sense mechanical, I should add that the result thereby arrived at seems to me an appropriate reflection in this case of the proportion of extra costs that were unnecessarily incurred and for which the respondents should be liable.
44. Mr. O'Connell suggested that had the respondents confined themselves to the issue of directions, the hearing would not have taken longer than an hour. Mr. Foley was reluctant to give a time estimate on that particular question.
45. As to the time actually expended at the hearing, Mr. O'Connell's estimate was 7.75 hours and Mr. Foley's estimate was 7 hours. Taking the more favourable estimate from a respondent's point of view given by Mr. Foley of seven hours and taking an estimate of one hour for the hypothetical hearing, had it actually been limited to the issues on which the respondent made some headway, a time estimate which has not effectively been countered, and having regard to the general principle of costs following the event, I should award costs to the applicants, but in all the circumstances should discount the costs in favour of the applicants by one-seventh.

Order

46. Accordingly, the further order will be:

- (i). by consent that there be directions under s. 12(2) of the 1996 Act as set out above;
- (ii). that 6/7ths of the costs be granted to the applicants; and
- (iii). by consent that there be an order under s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008 restricting publication of information tending to identify the donor and her children.