

**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**

**ENDURING POWER OF ATTORNEY EXECUTED BY MS H.D. ON THE 7<sup>TH</sup> DAY  
OF SEPTEMBER 2020**

**BETWEEN**

**[2024] IEHC 72**

**J. O’N. AND S.M.G**

**( the Attorneys of Ms. H.D.)**

**APPLICANTS**

**AND**

**N.B.**

**RESPONDENT**

**Judgment of Ms. Justice Nuala Jackson delivered on the 8<sup>th</sup> day of February 2024.**

**INTRODUCTION**

1. There is no doubt that one of the most significant challenges which any family faces is coming to terms with the ageing of a parent and the making of appropriate arrangements in that context. This is particularly difficult when the ageing process cruelly includes illness and incapacity. Informed by emotion, family history and, above all, deep affection, perspectives may differ as to the appropriate route of travel and this, unfortunately, leads to acrimony and divergence despite there being a commonality of result sought to be achieved namely that the parent be safe, comfortable and protected. In this case, although opinions have differed, I have no doubt that the actions of all have been primarily dictated by parental affection.

2. 'H.D.' ('the donor') executed an enduring power of attorney ('EPA'), pursuant to the provisions of the Powers of Attorney Act, 1996 ('the 1996 Act'), on the 7<sup>th</sup> September 2020. The application herein is brought by two of her daughters, the first and second named attorneys (hereinafter 'the first named attorney' and 'the second named attorney'), being the persons so appointed pursuant to the said EPA, and their application is for the registration of the EPA aforementioned. I am asked to rule upon an objection to such registration on a number of bases which is made by the donor's son ('the Respondent'). The donor has four children. The fourth child, her third daughter, is supportive of the application for registration and gave evidence before me so indicating.

### **THE POWERS OF ATTORNEY ACT, 1996**

3. The statutory framework introduced by the 1996 Act was novel for this jurisdiction and clearly represents a desirable legal facility for persons who wish to make arrangements for the management of their affairs when and if they cease to be capacitous. An EPA is executed at a time when the donor has capacity and it thereafter sits in abeyance, ready to be activated when capacity is lost. The activation process is through registration by application to the High Court. This is such an application.
4. As stated by Baker J. in *A.A v. F.F* [2015] IEHC 142:

*"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.”*

5. There are some statutory provisions in the 1996 Act which I consider important to reference at the outset:

- “Mental incapacity” is defined in section 4 of the 1996 Act as being: *“incapacity by reason of mental condition to manage and administer his or her own property and affairs and cognate expressions shall be construed accordingly.”*
- There is a statutory assumption of capacity where this is required, section 4(3) of the 1996 Act states: *“If any question arises under this Part as to what the donor of the enduring power might at any time be expected to do it shall be assumed that the donor had the mental capacity to do so.”*
- Applications for registration (such as is currently before me) are provided for in section 9 of the 1996 Act. The provisions of this section have been complied with herein. As required by section 9(4), I have been provided with a report from the donor’s General Practitioner confirming that she “has significant cognitive impairment now that she has no longer got the mental capacity to manage her finances and the EPOA should be registered now.” Indeed, it was agreed by the attorneys and by the two notice parties (one

such being the Respondent and the other the donor's fourth child) that the donor, regrettably, had reached a stage of being unable to manage her affairs and has significant cognitive impairment.

- Section 10 of the 1996 Act provides for the within application. It will be considered in greater detail below.
- It is important to state that this Court retains a supervisory jurisdiction post-registration, pursuant to section 12 of the 1996 Act, which may be invoked by “the donor, the attorney or any other interested party”. There is no definition of “other interested party” in the 1996 Act but it is clear that notice parties under the EPA would be such. Indeed, provision for oversight by this Court pre-registration is made in section 8 of the 1996 Act. The distinction between EPAs and other reliefs in the context of incapacity does not require to be examined in this decision but it should be noted that the jurisdiction of this Court in the context of EPA is one which may be invoked in accordance with the terms of the legislation and is not unbounded, which position is in keeping with the autonomous nature of the EPA and its creation.

## **THE OBJECTIONS**

6. The Respondent herein has raised a number of objections to registration pursuant to section 10(3) of the 1996 Act. In his first affidavit herein, he referenced objections under sub-section (3)(a), (b), (d) and (e). At hearing, the Respondent clarified that his objections were pursuant to sub-section (3)(a), (d) and (e) only. A number of detailed affidavits with exhibits were sworn in the context of this application and I heard oral testimony from the solicitor for the donor/attorneys, both of the attorneys, the Respondent and the second notice party. The averments in these affidavits detailed many aspects of family history and family life as regards the donor's circumstances and, as with all families, this family has faced times of challenge and times of joy, and everything in between. Sibling relationships have ebbed and flowed as indeed have parent/child relationships. This is but the normal wear and tear of life and I am satisfied that it is no more so than normal in this case. I was, however, impressed by the support

which they had offered each other (and the donor) in the context of the unique challenges of the outbreak of the Covid pandemic. Many of the averments were not pertinent to the issues which I must decide but I have considered them in their totality. Those averments which I consider to have been of particular import in the context of this application are detailed below.

7. I will deal with these objections sequentially.

**Objection under S.10(3)(a) of the 1996 Act: that the power purported to have been created by the instrument was not valid.**

8. During the course of the hearing herein, the Respondent informed me that his challenge on this ground was based on the incapacity of the donor at the time of execution of the EPA due to an adverse reaction which she was experiencing from medication for depression. He indicated that this was an adverse reaction which she had previously experienced for the same reason.

9. The Respondent avers, *inter alia*:

- i) The first named attorney had taken the donor to the donor's doctor who had prescribed anti-depressant medication for the donor. This would appear to have been on or about the 21<sup>st</sup> August 2020. There is reference to the donor previously experiencing an adverse reaction to such medication. There is reference to the donor subsequently (in May 2022) being taken off anti-depressants as the Respondent had advised the doctors that he was aware of a previous bad reaction. The Respondent queries whether the doctor who determined capacity following the visit of the 9<sup>th</sup> September 2020 was informed about the side effects and reaction of the donor to the medication referenced.
- ii) At the time of execution of the EPA, the donor was depressed and had recently been put on medication that has a serious and known 14/28 day warning of adverse side effects, compromising safety, wellbeing and life, thus bringing the mental state of the donor into question.
- iii) The doctor confirming capacity lacked information and was not a psychologist.

- iv) The donor indicated at some previous time that she did not like how she felt on anti-depressants, that they did not agree with her and she had come off same.
- v) There is evidence of medical intervention with mind altering SRI administered on and just before the EPA signing.

10. There is no detail in the Affidavits as to the nature of the adverse reaction relative to capacity, the date of the asserted prior reaction and, in circumstances in which the donor attended the same General Practice throughout, why her medical notes held by that practice would not have disclosed this. There is no medical evidence in relation to such alleged reaction or the nature and extent of same.

11. There was evidence before me in relation to the capacity of the donor at the time of execution of the EPA. First, an affidavit was sworn by and I heard oral testimony from Mr. Fintan Lawlor, solicitor for the attorneys and the donor. Mr. Lawlor, a solicitor of considerable experience, had provided legal services to the donor previously and she was known to him in this context. He indicated that he had personally taken the instructions for the EPA from the donor and that the nature and implications of same were fully explained to her. He indicated that he did not have capacity concerns. While it would appear that the first named attorney was present with the donor throughout the period of her attendance with Mr. Lawlor, he did not observe anything which caused him to question capacity or voluntariness (although, perhaps, the latter is more relevant to sub-section (3)(e) below). The uncontradicted evidence is that the donor visited Mr. Lawlor's office on the 7<sup>th</sup> September 2020 at which time the EPA was executed by her. Mr. Lawlor certifies in the EPA that the donor understood the effect of creating the EPA. The signature of the donor in the EPA is witnessed by Mr. Lawlor. While it would have been preferable that Mr. Lawlor would have seen the donor on her own for at least some part of the execution appointment, I further note his evidence that he had a telephone conversation with the donor in the context of arranging an appointment for such execution and he found her lucid in this communication.

12. In addition to the foregoing, capacity at the time of execution was confirmed by a medical practitioner. The donor was a patient at a medical practice with a number of doctors. As is usual, while she had a General Practitioner to whom she was assigned, she would see other practitioners in the practice, depending on availability and the

professionals on duty. Her medical notes would be available to all doctors in the practice. Mental capacity was confirmed by a doctor in her usual practice, albeit not her assigned doctor who was not available on the date in question. While the Statement of the registered medical practitioner at Part E of the EPA is dated the 5<sup>th</sup> October 2020, it is stated therein that the opinion stated relates to the time of execution of the EPA and the evidence at hearing indicated that the visit by the donor to the confirming doctor was very proximate to execution. An email from the General Practitioner concerned was most helpfully provided by the Respondent and this indicated that the appointment was on the 9<sup>th</sup> September 2020 (2 days post execution) and that the donor was seen alone at the consultation. There was some controversy as to whether the first named attorney was still in Ireland at that date and how the donor journeyed to the consultation. It should be noted that in his first affidavit, sworn on the 9<sup>th</sup> September 2022, the Respondent avers that the first named attorney returned to the United States on the 8<sup>th</sup> September 2020 (paragraph 8). I am not sure that much turns on these details in circumstances in which capacity was being professionally tested, the donor consulted alone with the doctor and the doctor had the medical files which would have detailed all medication and previous and extant medical treatments.

13. The attorneys dispute that there was any lack of capacity caused by medication at the time of execution of the EPA.
  
14. It must be borne in mind that the onus of proving an objection is on the objector (Baker J. so accepted in *Re SCR (Power of Attorney)* [2015] IEHC 308). In the circumstances and having considered the totality of the evidence and, in particular, the professional evidence, I do not find that the objection based upon a lack of capacity at the time of execution to be proved.

**Objection under S.10(3)(d) of the 1996 Act: that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney.**

15. The legal test for unsuitability under section 10 of the 1996 Act was considered by Morris P. in *In Re Hamilton* [1999] 3 IR 310:

*“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 Section 10 has no connection with the proposed Attorney's skill at managing the donor's property. 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 the removal of a trustee..”*

16. During the course of the hearing herein, the Respondent informed me that his challenge on this ground was based on different concerns as regards both attorneys. In relation to the first named attorney, unsuitability was based upon:

- (i) she resides outside the jurisdiction;
- (ii) she had a poor relationship with the donor and there had been acrimony and altercation between the donor and the first named attorney;
- (iii) she refused to communicate with the Respondent;
- (iv) she had imposed pressure upon the donor in relation to land issues and/or in relation to the signing of the EPA. I will consider this basis under (e) below as it seems most pertinent to that ground of objection. However, as it clearly impacts on suitability also, it cannot be ignored under subsection(3)(d).

In relation to the second named attorney, unsuitability was based upon:

- (i) her inability to withstand stress and pressure (I believe that this was expressed by the Respondent in a general sense and also *vis a vis* the first named attorney). The Respondent opined that she was “not able for it”;
- (ii) she was unwell – reference was made to shingles, Covid and nervousness. There was also a reference to alcohol/addiction issues;
- (iii) that she had not herself sworn affidavits in the application;



(iv) that she would hand over her powers as an attorney to her two sisters.

17. It is fair to say that the Respondent's opposition to the second named attorney was much less than his opposition to the first named attorney and the height of his objection to her appeared to be that she was a very good person but would be unduly influenced by others. It must be stated that the outset that it is not uncommon in litigation involving two persons taking the same position that affidavits are sworn by one such person on their own behalf and in a representative capacity for the other. The affidavits of the first named attorney herein are expressed in these terms and the second named attorney did not disagree with (indeed, she supported) the contents of same in her oral testimony before me. Having heard the oral testimony of the second named attorney, I have no doubt as to her suitability to act as an attorney in respect of her mother. Her evidence was clear and unambiguous. She was realistic in relation to family issues and she understood the task which she had to perform. The undisputed evidence was that she holds down a responsible occupation and has done so over many years. There is no doubt that she was stressed (indeed, distressed) by the litigation and how matters had transpired but I believe this was in common with all of the siblings (including the Respondent). I formed the view that the person most distressed by these matters was the first named attorney but I will deal with this below.

18. I want to be very clear that I formed the view that all of the sibling witnesses before me were good and honest people. They were all coping with a distressing circumstance upon the road of life in their own particular ways, but it is my finding that all are doing their best. It is unfortunate that there is no commonality of view as to what 'best' is. In relation to the first named attorney, while she resides outside the jurisdiction, it is clear that she has visited regularly and continues to visit regularly. This was considered by Humphreys J. in *N.B & J.B v. C.B & I.B* [2020] IEHC 216:

*"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."*

19. Furthermore, the evidence of Mr. Lawlor, solicitor, was that he had discussed with the donor the fact that the first named attorney lived outside the jurisdiction and the donor wished to proceed nonetheless. I formed the view that the first named attorney was very committed to her mother, but that the relationship between them could at times be challenging for her and that there were arguments and frustrations on occasion. There are few families in which argument and frustration does not arise from time to time. These are often an expression of care rather than acrimony and I formed the view that this was the position here. I did not form the view that there was any adversity in the relationship such as would result in unsuitability. It is clear that there was occasion of argument between the donor and her eldest daughter in or about August 2020. The Respondent believes this to have been in relation to matters concerning property and pressure concerning the execution of an EPA, however, in fairness to him, he accepted that he did not hear the argument but merely observed post argument demeanours of both. The first named attorney gave evidence of opposition on the part of the donor to certain care needs which she was endeavouring to implement. I do not consider these events to support unsuitability or to involve any pressures or influences of an untoward nature.

20. In relation to communication, it is clear that there was at some point a family private internet group but that this had ceased. Many of the exhibits of the Respondent indicated that he had left the group or had blocked the group. Whatever the logistics, it is clear that communication reduced and ultimately ceased in the context of the within proceedings. The affidavits of the Respondent referenced many matters which he submitted were indicative of unsuitability including historic poor relations, issues relating to medication, varying attitudes to a lodger who lived with the donor, bruises on the donor's arm, issues relating to the donor's car, her driving and her property, including bank accounts. Additionally, there were issues pertaining to the most appropriate care arrangements for the donor, her capacity during a holiday in Sligo in the late summer of 2021 and alleged restrictions imposed by the nursing home upon the Respondent and the instigator(s) of such restrictions. Many of these were, in terms of chronology, not relevant to the grounds of objection at (a) and (e) but I have considered all of these matters in terms of suitability, having regard to the totality of evidence and, in particular, the oral evidence before me. I must make reference to certain matters in particular. In relation to the bruising on the donor's arm, there is simply no evidence

that either of the attorneys was in any way responsible for this. It should be noted that it was the first named attorney who photographed the bruising and posted it to the family chat group querying how it might have arisen. It seems to me most likely that the bruising occurred in the context of medical treatment which the donor had around this time. There appears to have been some digital communication about who would be the executor(s) of the donor's Will and donor would appear to have had changing views in this regard. I am not considering a Will or the execution of same. I do not know if any Will was executed around this time. None of the communications relates to an EPA and the evidence before me is that the donor gave clear instructions in relation to her EPA to her solicitor of long-standing. In any event, the possibility that others might have been appointed as attorney does not mean that those appointed are unsuitable. The remainder of the concerns of the Respondent, disputed by the attorneys, may best be categorised as family hostility.

21. I must, again, refer to the dicta of Humphreys J. as being apposite here:

*“16. Family hostility is not a basis for a finding of unsuitability.*

*17. 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, 8<sup>th</sup> 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.”*

Furthermore, in **G.B & M.B v. H.B [2016] IEHC 615**, Barr J. states:

*29..... In the case of Re W. 2000 1 All E.R. 175, the issue of hostility between the donor's children was looked at. Counsel submitted that this case laid down the correct test which should be applied in deciding whether the hostility was of sufficient gravity to disentitle one of the children to act as the donor's attorney. In particular, he referred to the head note which read as follows at para. 2:- “Hostility towards the attorney on the part of other interested parties did not of itself mean that the attorney was unsuitable within the meaning of [equivalent section to s. 10 in the Irish Act]. Such hostility would render an attorney unsuitable only if it would impact adversely on the administration of the estate. In the instant case as the affairs of the estate were not complicated, the hostility between W's children would not interfere with the smooth running of the administration and it would therefore have been wrong to frustrate W's choice of attorney.”*

30. Counsel also referred to the following portion from the judgment of Jules Sher Q.C. at p. 182:- “Whether it is or is not a good idea for a parent in Mrs. W’s position, when such hostility exists, to appoint one child alone as attorney is another question. But Mrs. W did so and on the evidence, did so knowing of the hostility. That is her prerogative and, in my judgment, when the hostility does not interfere with the smooth running of the administration, the court should not interfere on the ground of unsuitability.”

22. It is my finding in this case that the family hostility is not such as would interfere with the smooth running of the administration of the affairs of the donor by the attorneys.
23. During the course of evidence, a matter of concern to me did arise. Both of the attorneys had given evidence in relation to the extent of the estate of the donor but it became clear during the course of evidence and the Respondent had referenced in his affidavits certain joint accounts held by the donor. There was some confusion in this regard as the Respondent had deposed to these being held with “the First Named Party” and it was unclear to me whether this was the first named applicant/attorney or the first named notice party. It transpired to be the latter. There were two such accounts and neither attorney had referenced these accounts in their testimony regarding the extent of the property of the donor. The first name notice party who was the joint account holder gave evidence and readily accepted that the donor was the beneficial owner of the funds in these accounts. Further documentation was presented to me at a resumed hearing and I am satisfied that there is nothing arising which renders the suitability of the attorneys at issue. The application documents for the Fair Deal Scheme were produced and these accounts had been referenced therein. There was some confusion as to the extent of the donor’s interest in her family home but, again, the evidence adduced was that a letter from solicitors and a copy of the relevant testamentary document (Will of a third party) had been submitted with the Fair Deal documentation. There is no doubt that the accounting and account management which is in place was somewhat convoluted but I accept that there have been challenges in this regard in the context of the incapacity of the donor and the registration of the EPA being extant.
24. The extent of financial/management expertise required of attorneys has been considered in the caselaw. As Barr J. stated in *G.B & M.B v. H.B* [2016] IEHC 615:

*“31. Counsel also referred to Re Hamilton’s Application 1999 3 IR 310, where an objection was raised to the registration of the EPA, due to the alleged mismanagement by the attorneys of the donor’s estate up to the time that the objection had been made. In the course of his judgment, Morris P. stated as follows in relation to an objection based on lack of skill on the part of the attorney:- “In my view, lack of business skill is not a valid objection to the registration under section 10. It is perfectly normal for a donor to choose a member of his or her family or somebody sympathetic to him or her to act as an attorney. It would, in my view, be an improper exercise of the discretion vested in the court to refuse to register an instrument simply because the chosen attorney did not possess management and business skills in a high degree. In my view the word ‘unsuitable’ when used in s. 10 has no connection with the proposed attorney’s skill at managing the donor’s property. A criticism made of a proposed attorney, to constitute a ground for refusing to register an instrument, must far exceed the corresponding test applied by the courts in applications for the removal of a trustee.... I believe that it is clear that for an objection to be upheld by the court a criticism far more fundamental than mere lack of management skills must be established.”*

*32. Counsel submitted that the portion of the judgment of Morris P. which stated that the grounds for removal of an attorney must exceed those for removal of a trustee were obiter dicta. Counsel noted that in the subsequent case of M.L. v. D.W. [2016] IEHC 164, where Kelly P. agreed with the judgment of Morris P. in Hamilton’s case, he did not refer to the trustee test as being the correct test for determining the suitability of an attorney. Kelly P. also agreed with the observations of Baker J. in Re S.C.R. 2015 IEHC 308, where she had stated as follows in relation to the burden of proof placed upon the objectors:- “I accept counsel’s argument that the burden lies on the objector and that the decision must be in favour of registration unless it is established that Mr R lacked capacity to execute the instrument. The legislation permits objection to be raised on a number of identified grounds and s. 10(4) provides that the court may refuse an application on any of these grounds. I accept counsel’s point that the objectors must do more than raise a hypothetical or formal ground of objection.”*

25. As opined by Humphreys J. in ***N.B & Anor v C.B & Anor*** [2020] IEHC 216:

*“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.”*

26. I am satisfied that there has been no misconduct such as would negative the suitability of the attorneys and, furthermore, I do not believe there has been mismanagement rather

the financial arrangements have been somewhat muddled. I will address this below but it is something the attorneys will need to address and render more transparent.

27. Having considered the evidence herein, I do not find the objection based on lack of suitability to be proved in respect of either of the attorneys.

**Objection under S.10(3)(e) of the 1996 Act: that fraud or undue pressure was used to induce the donor to create the power.**

28. *GB and MB v. HB* [2016] IEHC 615, makes it clear that, yet again, the onus of establishing these grounds rests upon the Respondent. While the Respondent expressed dissatisfaction and some concern about certain interactions between the donor and other family members, I cannot see that there was any evidence of fraud and, in particular, there was no evidence of fraud being used to induce the donor to create the power which is the requirement in respect of sub-section (3)(e) above. There was little direct evidence relating to the second part of this ground of objection namely undue influence. The Respondent relied upon the argumentative relationship between the donor and the first named attorney. I have dealt with this relating to (d) above. There were also some references to text messages in this regard.

The averments relating to this ground related to alleged arguments between the donor and the first named attorney in or about August 2020.

- Paragraph 7 – Affidavit of Respondent 9<sup>th</sup> September 2022 – “I say that on the 19<sup>th</sup> August 2020, I attended my mother’s house to find the first named attorney extremely angry towards her over something. I could not ascertain why. My mother was sitting there staring at the TV ignoring what she was saying to her. On the 20<sup>th</sup> August 2020, I say that the first named attorney sent me a text to say that the altercation was about a Power of Attorney and that my mother had decided at that point that she did not want either named Attorney to act on her behalf.” There is no exhibit relating to this averment. Paragraph 14 of the Affidavit of the first named attorney of the 27<sup>th</sup> February 2023 replies: “I say that neither your deponent nor the second-named Attorney were made aware by the Donor that she intended to appoint the

second-named Notice Party as an Attorney of her EPA. I completely refute the content of this paragraph of his Affidavit and say that no such incident or conversation took place.”

- Further averments relating to this matter are contained in Paragraph 19 of the Second Affidavit of the Respondent of the 13<sup>th</sup> July 2023 and there are documents exhibited therein. I have considered these exhibits and they indicate that there was an argument and that the first named attorney was experiencing frustrations arising from the care needs of the donor. Indeed, a number of the exhibits indicate that the Respondent was sympathetic to the situation of the first named attorney and understood it. I do not find evidence of undue influence on the part of the first named attorney upon the donor, rather she appears to be indicating that she needed a break from interactions with the then competent donor. In addition, in his evidence before me, the Respondent indicated that he did not know what the arguments were about, simply that he saw the aftermath of argument on the August 2020 date.

29. The pre-existing professional relationship between the donor and the solicitor who advised in relation to the EPA has been detailed above. In relation to this ground of objection, however, reference must be made to Part D of the EPA wherein Mr. Lawlor states he has “no reason to believe that this document is being executed by the donor as a result of fraud or undue influence.” I found the oral testimony of Mr. Lawlor most compelling and he painted a picture of the donor prior to her current incapacitous state. He described her as “... a very elegant, very strong woman, nearly like a school mistress, nearly intimidating.” He continued that she was “not a frail old lady ... a very pleasant lady but school mistress type, upright and firm”. He expressed “no concerns” in relation to the dynamic between the first named attorney and the donor – it was “the usual mother/daughter relationship”.

30. Having considered the evidence herein, I do not find the objection based on inducement through fraud or undue influence to be proved in respect of either of the attorneys (indeed, at hearing, the Respondent appeared to wish to pursue this only in respect of the first named attorney).

## CONSEQUENTIAL MATTERS

31. I have referred above to my concerns in relation to the somewhat muddled and chaotic accounting which was proffered in relation to the donor's affairs since she went into the nursing home. I am very aware of the challenges in circumstances in which the Fair Deal Scheme had to be applied for and rendered operational and funds had to be found in respect of the balance of nursing home fees to be paid by the donor/the family. Undoubtedly, regularising the donor's affairs has been rendered more difficult by the absence of registration of the EPA. It is to be hoped that this may be rectified. However, based upon these concerns as emerging in evidence and expressed by the Respondent, I am minded to make one direction under section 12. I am mindful that it is generally envisaged that directions are made on the application of an interested party rather than on the court's own motion (Baker J. *AA v. FF* [2015] IEHC 142) but clearly the Court has a responsibility to protect the donor. As Baker J. states:

*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.*

32. In *N.B & Anor v C.B & Anor*, Humphreys J. stated:

*“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.”*

33. I further note that section 12 directions were made by Barr J. in *G.B. & Anor v. H.B.* [2016] IEHC 615 in the context of a section 10 application. I would make similar (but not identical) orders in this case, to apply going forward from this time, being:

- A. The attorneys are to produce accounts in respect of their management of the donor’s estate on or before 31st January of each succeeding year in respect of the immediately preceding calendar year (the first such date will be the 31<sup>st</sup> January 2025). These accounts are to be produced to both of the notice parties. The financial affairs of the donor are not complex and the accounts ordered herein do not need to be complex. They simply need to list the monies received by the donor and any contributions made by third parties (including the attorneys and the notice parties) towards her upkeep and to list the expenses incurred in respect of the donor together with a list of balances in any accounts of which the donor is a sole or joint accountholder or any other accounts to which she is beneficially entitled.*
- B. Liberty to the parties to apply in relation to any failure by them to furnish the accounts as directed herein.*

34. I will list this matter before me on the 22<sup>nd</sup> February 2024 at 10.30 a.m. in respect of any issues arising, including any issues relating to costs of this application. I am mindful of the burden of travel upon the first named attorney so I will endeavour to make arrangements that she (or any of the other parties) may attend such listing on a remote basis should she (or they) so wish.