Neutral Citation No: [2024] NIFam 7 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McF12580** *Ref No:* **EPA - 6073** *Delivered:* **19/07/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

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AB

Appellant

-v-

JANE WATSON
(as Controller of a patient)

and

CD

Respondents

_____

The appellant and Jane Watson appeared in person
CD did not appear

_____

McFARLAND J

Introduction

[1] This is an appeal by AB against an order of Master Wells of 23 May 2024 whereby she refused an application by AB that he be reinstated as the attorney of his mother.

[2] I conducted a hearing of the appeal on 8 July 2024 when AB appeared in person as did Ms Watson, a partner in the firm of WG Maginess & Son solicitors. CD, a brother of AB, did not appear.

[3] I have anonymised this judgment to protect the privacy of the parties, and in particular the mother, who I will call "EF."

Background

[4] EF is a widow aged 91 years of age. On 5 January 2021 she executed an enduring power of attorney ("EPA") whereby she appointed her two sons AB and CD to be her joint and several attorneys with unrestricted powers.

[5] The EPA was registered in the High Court on 26 November 2021. This would have been on the basis that EF had become or was becoming incapable of managing her own affairs.

[6] At that stage AB and CD took over the management of their mother's affairs although there appears to have been little engagement by CD. AB has described him as a paranoid schizophrenic.

[7] Danske Bank alerted the High Court to its concerns in respect of activity on EF's bank account in December 2022 and later in March 2023. Investigations revealed that during the period AB, acting as his mother's attorney, had transferred sums in excess of £250,000 from his mother's account for his benefit and for the benefit of one of his daughters.

[8] CD made an approach to the High Court in January 2023 complaining about his brother using EF's funds for his own personal use.

[9] Following a tendering process, the High Court appointed Ms Watson as a Controller *ad interim* to represent the interests of EF. Ms Watson filed her initial report on 17 April 2023 and on 20 April 2023 Master Wells having noted AB's conduct in continuing to remove funds from his mother's bank account, stayed his appointment as attorney.

[10] Ms Watson then filed her final report on 2 June 2023 with AB filing a response on 12 June 2023. After a court hearing Master Wells on 16 June 2023 discharged AB as co-attorney due to his breach of authority under Article 5 of the Enduring Powers of Attorney (NI) Order 1987 ("the 1987 Order"). Her reason for doing so was her extreme concern over the removal of a significant amount of money from EF's funds for his own personal use and his failure to acknowledge that he had done anything wrong.

[11] In addition to discharging AB as attorney, Ms Watson was discharged as Controller. At that stage CD was permitted to act as the continuing attorney.

[12] On 19 March 2024, AB applied to the High Court to be re-instated as EF's attorney. The basis of that application was the inaction of CD in managing EF's affairs and a challenge to the decision to remove him.

[13] On 23 May 2024 Master Wells conducted a hearing which was attended by AB, one of his daughters, Ms Watson (who had been re-appointed to represent EF's

interests), an assistant care manager of the South-Eastern HSC Trust, and EF (who AB had brought along to the hearing). CD did not attend and had not engaged with the High Court despite a direction that he file a replying statement.

The decision of 23 May 2024

[14] Master Wells gave a reasoned decision. She noted the non-engagement by CD as sole attorney, that EF continued to lack the capacity to manage her own affairs and to give informed consent to significant financial gifts and that additional safeguards "must be in place to protect her." The continuing approach by AB in not acknowledging the incorrectness of his conduct when managing his mother's affairs was noted. Master Wells also considered the content of EF's current will (dated June 2018) whereby she bequeathed her estate in equal one third shares between CD, AB and his wife, and AB and his wife "in full confidence but without imposing any binding trust or legal obligation that they will apply same for the benefit of their [two] daughters."

[15] Master Wells refused AB's application setting out four reasons - the non-acceptance by AB of the June 2023 order; AB's refusal to accept that he did anything wrong in using his mother's money to discharge his mortgage, to finance his daughter's education in Paris and to buy himself a car; if re-instated he would act without consultation with his brother the co-attorney; and AB's belief that his mother both consented to, and approved, his use of her money for his and his daughter's personal use. AB was also ordered to pay Ms Watson's legal costs from his own funds.

The appeal

[16] On 29 May 2024, AB appealed the decision of Master Wells of 23 May 2024 seeking a variation of the order by receiving an apology from the Office of Care and Protection and that he be re-instated as joint attorney of EF without any restrictions. In a statement attached to the notice of appeal he referred to Ms Watson's report to the court as being based on "manipulations and lies", to Master Wells misrepresenting his intentions and role, to his transparency in his dealings with his mother's affairs, and to Master Wells's belief that his mother lacks capacity, a position he now challenges referring to a report from Dr Nirodi.

[17] I conducted the hearing on 8 July 2024 which was attended by AB and by Ms Watson. Again, AB also brought his mother to the hearing, although she did not contribute to the hearing.

[18] Both parties provided written submissions by way of skeleton argument with AB supplementing his argument with a further statement concerning his late father's will.

[19] The arguments advanced by AB in his documents and by his oral submission were not particularly co-ordinated, but can be summarised as follows:

- Article 5(4) of the 1987 Order permitted him to transfer money to himself and his daughter as there were no restrictions in the power of attorney document, he could act to benefit himself and his daughter without consent of anyone as, in the words of the legislation, his mother "might be expected to provide for [their] needs" and he was doing what his mother "might be expected to do to meet those needs."

- The words 'needs' and 'might' must be defined in the broadest of terms.

- 'Needs' would therefore include the full array of needs over and above basic physiological needs, including safety needs, love and belonging, esteem and self-actualization.

- 'Might' should be interpreted to cover any possibility.

- His mother not only might have approved but he asserted that she would have been happy to approve.

- His mother did have capacity and had actually approved the payments.

- There was nothing unreasonable about his conduct given the size of his mother's estate (in excess of £1m) and given her expressed intentions set out in her will.

- His actions in returning to Northern Ireland primarily to facilitate his mother's return from a nursing home to live with him in the family home did reduce his income and availability for employment.

- He acted throughout with full transparency and that he intended to account fully for all transactions on his mother's death.

- Because of the terms of his mother's will (which appointed the two brothers as trustees to hold the estate in trust to be divided on the terms set out above and empowered the trustees to make use of the estate for whatever purpose they deem fit) provided him with additional permission to act as he did.

[20] No evidence was formally given at the appeal hearing, although in response to some questions, and during his oral submissions, AB did give some unsworn evidence about certain factual matters. On being asked how he intended to compensate his brother for what could be potentially a reduction in his share of his mother's estate on her death arising from these *inter vivos* gifts and inheritance tax arising from the gifts should the mother not survive them by seven years, AB said

that he had served in the French Foreign Legion and he was bound by the honour of that regiment as encapsulated in its motto *Honneur et Fidélité* and on that basis he would do right by his brother.

[21] When asked as to why he had not done so already, he indicated that as his brother was living on means tested state benefits, giving his brother money would be pointless as he would lose his entitlement to the benefits.

The 1987 Order

[22] The purpose of the 1987 Order was to cure a problem relating to the appointment of attorneys when donors of the power became mentally incapable of managing their affairs. Such an occurrence operated to revoke the power and that then required the formal approach to the High Court for the appointment of a controller to manage the affairs of the donor of the revoked power. In some circumstances that would have been a necessary step, but it was considered that in the vast majority of straightforward cases the situation could be managed by the use of EPAs without any significant court intervention.

[23] The Law Commission produced a report 'The Incapacitated Principal' (July 1983 Law Com. No. 122) together with certain recommendations which included draft legislation which was later to be enacted in England and Wales as the Enduring Powers of Attorney Act 1985. The 1987 Order replicates that Act in Northern Ireland.

[24] This legislation sets out the characteristics of an enduring power, the scope of authority under the power and the duties of an attorney.

[25] Article 5(4) and (5) provide as follows:

> "(4) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further, that is to say—
>
> (a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively; and
>
> (b) he may do whatever the donor might be expected to do to meet those needs.

> (5) Without prejudice to paragraph (4) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further, that is to say—
>
> (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including himself) who are related to or connected with the donor, and
>
> (b) he may make gifts to any charity to whom the donor made or might be expected to make gifts, provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate."

[26] The court is granted a function by Article 10(1) and (2)(e) to authorise an attorney to act so as to benefit himself or other persons than the donor otherwise than in accordance with Article 5(4) and (5).

[27] Article 10(4) provides for circumstances under which a court can cancel the registration of a power. Article 10(4)(g) states:

> "(4) The court shall cancel the registration of an instrument registered under Article 8 in any of the following circumstances, that is to say …
>
> (g) on being satisfied that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney."

[28] Article 10(5) states that on cancelling the registration under Article 10(4)(g) the court should also revoke the power of attorney, however, Article 13, which deals with joint and several attorneys, provides at 13(7) that:

> "The court shall not cancel the registration of an instrument under Article 10(4) for any of the causes vitiating registration specified in that paragraph if an enduring power subsists as respects some attorney who is not affected thereby but shall give effect to it by the prescribed qualification of the registration."

Consideration

[29] It is essential that this appeal is seen in its context. On 16 June 2023 Master Wells removed AB as an attorney under the EPA. She did so under Article 10(4)(g) of the 1987 Order on the basis of the unsuitability of AB as an attorney. That decision was not appealed. It is not open to me to re-visit that decision.

[30] What is being appealed is the decision of 23 May 2024, which was a decision not to re-instate AB as an attorney. Essentially the question Master Wells would have been asking herself was whether there had been any developments since 16 June 2023 that would require her to re-instate AB as an attorney, notwithstanding the fact that it had been determined that AB was an unsuitable attorney for his mother.

[31] AB's efforts to challenge the original decision may have resulted in the focus of the hearing in May 2024 to revert back to the issues in June 2023. AB has also attempted, before me, to challenge the original decision.

[32] As for the intervening events, it is obvious that CD does not appear to have engaged sufficiently with the management of his mother's affairs using his powers as her sole remaining attorney, or indeed with the court process. There is no evidence of him taking any proactive steps. This has resulted in an unfortunate state of affairs. With AB's registration cancelled and the sole remaining attorney lacking engagement, nothing is happening in relation to EF's financial affairs. In the circumstances serious consideration has to be given to resolving this problem.

[33] This could only be achieved by either the re-instatement of AB as attorney or, if that is considered not to be appropriate, the appointment of an independent controller under the provisions of Part VIII of the Mental Health (NI) Order 1986 and Order 109 of the Rules of the Court of Judicature.

[34] One of the matters that concerned Master Wells was AB's failure to acknowledge that he had done anything wrong. This attitude persisted in the hearing before me. It perhaps can be best summed up using the words which AB will no doubt be familiar with, given its connection with the *Légion étrangère*:

> "*Non, rien de rien,*
> *Non, je ne regrette rien.*"

[35] As indicated the correctness of the June 2023 order cannot be challenged before me. It does, however, have some relevance as it could still have been open to Master Wells to consider re-appointment notwithstanding his previous conduct. In making that decision the relevant issues are whether AB has shown any understanding of how his conduct was inappropriate, whether he is likely to repeat his conduct and whether he had taken any steps to rectify the matter.

[36] As the interpretation of Article 5(4) remains an ongoing issue with AB, I will very briefly comment on why I consider the decision of Master Wells in June 2023 to be correct. AB relies on the widest of interpretation of the words 'needs' and 'might.' Denning LJ in *Seaford Court Estates v Asher* [1949] 2 KB 481 at 499 observed that the English language is "not an instrument of mathematical precision." Lord Nicholls at the beginning of his speech in *ex p Spath Holme Ltd* [2001] 2 AC 349 at 396 said that "statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." This involves an exercise in ascertaining the intention of Parliament to be reasonably imputed by reference to the language used.

[37] AB objected to the use by Ms Watson of the content of the Law Commission report. Lord Nicholls indicated at [397] that it was entirely appropriate to use what he described as internal aids, such as consideration of other provisions in the statute and external aids such as "reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached) and a statute's legislative antecedents."

[38] Article 5 of the 1987 Order replicates section 3 of the English Act. It sets out the scope of an attorney's authority. Sub-article (4) and (5) relate to the actions of the attorney whereby the assets of the donor are transferred out of the ownership of the donor and passed to third parties, including the attorney. Sub-article (4) deals with situations where the donor might be expected to provide for that third party's needs. Sub-article (5) deals with *inter vivos* gifts which are to charities or third parties connected or related to the donor at seasonal or on occasions to mark a celebratory event, provided the amounts are not unreasonable having regard to all the circumstances.

[39] The Law Commission report in a section commencing at 4.23 entitled 'Benefitting others' sets out the policy and reasoning behind these sub-articles. It is not a useful exercise to quote this section in any detail but it sets out the rationale behind the policy which was later to be adopted by parliament.

[40] At its core, the relationship between AB and his mother under the EPA is one of agent, and as such he owes her a fiduciary duty.

[41] AB authorised the following transfers (which I have rounded off for convenience) out of the donor's assets:

- £120,000 to discharge a mortgage on his home in France;
- £12,000 to discharge his personal loans;
- £76,500 to discharge university fees of one of his daughters;
- £30,000 to him to purchase a car;

- £18,600 to him to cover what he described as 'personal necessities."

[42] AB's approach is basically that he has been obliged to move from France to Northern Ireland to care for his mother. As a result this has restricted his earning capacity. He continues to require to maintain his lifestyle thus creating needs which he is unable to make provision for. He also asserts that his daughter has educational needs which she is unable to pay for. He argues that in the circumstances the expenditure set out at [41] above is something that his mother might have been expected to pay had she been capable of doing so.

[43] When approaching the interpretation of the words 'might' and 'needs' it is important to consider the full phrase in the legislation – "he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively; and … he may do whatever the donor might be expected to do to meet those needs." AB's approach to the meaning of the word 'might' is that these are circumstances that his mother might have agreed to transfer the money, in the sense that is was a possibility, however remote.

[44] Such a wide interpretation is not justified when one considers the legislation as a whole and its general purpose. It has to be determined objectively taking into account what EF might do but not to the extent that EF might do anything with her money. It could never have been parliament's intention to allow for such a wide interpretation as argued for by AB. Given that EF might make any decision, rational or otherwise, about how to deal with her money and this would fall, as AB suggests, under the umbrella of a decision which she 'might' make, adopting such a wide interpretation would render the provision largely meaningless.

[45] I would interpret the wording to permit payment if it is a payment which fell within a range of decisions that EF, if she had capacity, could have made.

[46] Ultimately all the relevant circumstances have to be taken into account. AB's decision to come to Northern Ireland to care for his mother means that potentially his needs have increased due to a reduction in his income. As a consequence certain payments might fall within the permitted category is Article 5(4) of the 1987 Order. For example, AB's relocation to Northern Ireland has to be regarded as temporary. One could see an argument for payment of monthly payments of a mortgage to cover the period during which AB's income is reduced during his temporary stay away from France. It is difficult to see any justification for the discharge of an entire mortgage.

[47] A careful analysis would be required to look at the other payments, but that analysis should be made by the court under the 1987 Order, and not by AB, the recipient of most of the payments.

[48] What is clearly lacking in AB's approach is his failure to appreciate how these transfers will impact on the other family members who EF had intended to benefit under her will. Basically, her estate is to be divided into various shares. Assuming that AB and his wife will abide by EF's expressed wish that one third of the estate should benefit her two grandchildren, the estate is to be divided as follows:

- 1/3rd to CD
- 1/6th to AB
- 1/6th to AB's wife
- 1/6th to Granddaughter 1
- 1/6th to Granddaughter 2

[49] Even with a total estate in excess of £1 million, the payments set out at [41] (above) will make a significant impact on the distribution of the estate. The impact will be increased should EF die within seven years as this will create an inheritance tax liability which will fall on the residuary estate, thus reducing the amount available. These substantial gifts have made a reduction to what EF had intended CD, AB's wife and Granddaughter 2 to receive. As such, I do not consider that the gifts could ever be regarded as ones which EF might have approved of.

[50] By any definition these are gifts and should have been dealt with under Article 5(5) of the 1987 Order by AB seeking court approval. Given the overall circumstances it is highly unlikely that such approval would ever have been given without similar gifts being made to the other family members, or by other adjustments.

[51] Despite this compelling evidence, AB still clings to the belief that everything he has done has been appropriate. As such Master Wells was entirely correct in determining that, even with CD not engaging with the administration of EF's affairs, AB remains an unsuitable person to manage his mother's affairs, by reason of his conduct and his current appreciation of what is required of an attorney. He has retained the money transferred to him. He has made no attempt to repay it. He expects the court to be satisfied that reliance can be placed on his stated intention to be bound by his military code of 'honour and fidelity'.

[52] Another, and possibly more compelling, reason for not re-instating AB is that steps will now have to be taken to protect the interests of CD, AB's wife (from whom AB is estranged) and Granddaughter 2. This may involve proceedings against AB and Granddaughter 1 if that is considered appropriate, or given the size of the estate, appointment of a Controller and execution of a statutory will to make the necessary adjustments to the distribution of the estate so that it is divided in accordance with the intentions of EF as expressed in her current will. In these circumstances further involvement by AB in managing his mother's affairs would be entirely inappropriate given the conflict of interest.

[53] I will deal very briefly with two other points raised by AB. The first is that his mother does not in fact lack capacity. He has produced a letter from Dr Pratibha Nirodi addressed to a GP. Dr Nirodi does not state her current position but her qualifications indicate that she is a Fellow of the Royal College of Psychiatrists. It is unclear as to the status of the document as it is not a report prepared for court proceedings and it lacks any of the required expert's declarations. AB claims that the document is evidence that his mother does not lack capacity. No such opinion is expressed in the letter. Dr Nirodi refers to a diagnosis of "mixed dementia" but does not at any stage say that EF is capacitous. No other evidence concerning EF's capacity, which would run in any event contrary to AB's contention when registering the EPA that she lacked capacity, has been produced.

[54] The second point relates to provisions in EF's will that permits the appointed trustees (AB and CD) as they "think fit" to apply income or capital. He argues that he, as an intended trustee, can therefore exercise such powers without restriction during his mother's lifetime. This argument is flawed as the will does not become effective before his mother's death and gives him no powers over his mother's assets during her lifetime.

[55] In conclusion, the decision of Master Wells was entirely appropriate and could not be criticised in any way. The appeal is therefore dismissed.

Costs

[56] Ms Watson has had to be involved in this appeal to protect the interests of EF. I have considered whether her costs should be borne out of the assets of EF. This, of course, would result in a further diminution in the amount which will be available for distribution to the residuary beneficiaries under EF's will. AB has already been ordered to pay the costs for the hearing before Master Wells, and I see no reason why he should not pay the costs of this appeal. He is therefore directed to pay those costs, to be taxed in default of agreement.

Postscript

[57] I understand that Master Wells is continuing to review this case on an active basis. She should continue to do so, and I suggest that serious consideration is given to the appointment of a Controller and, should the recovery of the gifts made by AB to himself and Granddaughter 1 not be considered appropriate, the execution of a statutory will to remedy the losses suffered by CD, AB's wife and Granddaughter 2 as a result of the conduct of AB. In addition, the suitability of AB and CD as executors and trustees may need to be reviewed.