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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (FAMILY DIVISION)
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF A PATIENT

BETWEEN:

AB

Appellant

and

JANE WATSON (AS CONTROLLER OF THE PATIENT) First Respondent

and

CD

Second Respondent

AB appeared as a litigant in person
Mr Colmer KC (instructed by WG Magennis Solicitors) for the Controller
CD did not appear

Before: Keegan LCJ, Treacy LJ and McAlinden J

KEEGAN LCJ (*delivering the judgment of the court*)

The parties are anonymised as this case concerns a patient. Nothing should be published which identifies the patient or her family.

Introduction

[1] This is an appeal from an order issued by Mr Justice McFarland ("the judge") on 19 July 2024, and his subsequent judgment which is reported as *AB v Watson* [2024] NIFam 7. By his order, the judge dismissed the appellant's appeal of a Master's decision refusing to reinstate him as the attorney of his mother.

[2] The question on appeal is whether the correct approach was taken by the judge to this issue. The appellant seeks relief to be granted in the form of his reinstatement as attorney to his mother.

[3] The grounds of appeal have been set out in the appellant's notice of appeal and are threefold. The appellant contends that:

(a) The donor has not been acceptably medically examined;

(b) There is a contradiction in McFarland J's order of 19 July 2024, and

(c) Several important elements were overlooked in the order of 19 July 2024.

[4] The first instance judgment protected the parties' anonymity by referring to several abbreviations. The same approach is followed in this case. The appellant will therefore be referred to as 'AB', his brother is 'CD', and the donor mother is 'EF.'

[5] The appellant AB appears as a personal litigant. The respondent is Ms Jane Watson, who was reappointed as the interim controller of the donor EF as of 5 August 2024 and is a solicitor of the Court of Judicature. Adrian Colmer KC appears on her behalf. The appellant's brother CD is also a respondent in these proceedings, although he has not taken part at any stage.

Factual Background

[6] The relevant factual background leading up to the present case has been succinctly and thoroughly set out by the judge in his written judgment. For present purposes, we will restate the most relevant facts, and updated circumstances since the High Court decision.

[7] EF is a 91-year-old widow. On 5 January 2021, she executed an enduring power of attorney ("EPA"), appointing her two sons AB and CD to be her joint and several attorneys with unrestricted powers. The appellant notes that EF's husband was alive and in attendance when the EPA was signed. The EPA was registered at the High Court on 26 November 2021 on the basis that EF had become or was becoming incapable of managing her own affairs.

[8] From that point, AB took over the management of their mother's affairs, and there appears to have been little engagement from CD. AB has described his brother as a paranoid schizophrenic and informed us that he is now detained in hospital following an assault against AB's daughter.

[9] The trigger to court intervention came in December 2022 and later in March 2023. It was then that Danske Bank alerted the High Court to concerns in respect of

activity on EF's bank account. Investigations revealed that during that 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. The appellant does not dispute this fact.

[10] He confirms that this money was used to settle his mortgage on his house in France, which was his permanent place of residence before he moved to Northern Ireland to live with and assist his mother in August 2023. The money was also used to finance his daughter's education in Paris and to buy himself a car. The appellant maintains that this spending is justified on the basis that his mother would have wished to make payments of this nature to him and because he had to give up work when he moved to Northern Ireland to take care of her.

[11] In January 2023, CD, AB's brother and co-attorney, also made an approach to the High Court, complaining that his brother was using EF's funds for his own personal use.

[12] On 16 March 2023, Ms Watson was appointed by the High Court to be a Controller ad interim and to represent the interests of EF. Ms Watson filed her initial report on 17 April 2023. On 20 April 2023, Master Wells made the decision to stay AB's appointment as his mother's attorney, due to his continuing conduct to remove funds from his mother's bank account.

[13] Following this, Ms Watson filed her final report on 1 June 2023. In this report, Ms Watson recommended that AB be removed as EF's attorney, and CD should instead continue to manage EF's affairs on his own. While AB was to return to Northern Ireland to look after EF, Ms Watson recommended that CD set up a payment plan to be made into the joint account to cover any basic day to day items for EF. The appellant's brother CD informed the court on 5 June 2023 that he agreed with Ms Watson's recommendations.

[14] AB then filed a response statement to Ms Watson's 1 June 2023 report on 12 June 2023, rejecting her recommendations. One of his contentions was that his mother and brother were aware of his intentions for the use of his mother's estate since before Christmas 2021. In support of this, he attached Excel spreadsheets which detail his management of the expenses, income and transfers of his mother's funds. The first Excel spreadsheet is dated April 2022 and it outlines the appellant's management of the estate in terms of "monthly running costs and personal exploitation." These included details of outgoing payments, such as his daughter's education, his car, and his mother's living expenses. The second Excel sheet is dated March 2023, and consists of an "overview of estate division between stakeholders (at [his] father's death)."

[15] Following a court hearing on 16 June 2023, Master Wells made the decision to discharge AB as co-attorney for EF due to what she said was his breach of Article 5

of the Enduring Power of Attorney (Northern Ireland) Order 1987 ("the 1987 Order"). The breach she found was on the grounds that AB was taking significant amounts of funds from EF's account for his own personal use, and his denial that he has done anything wrong. Master Wells also noted that following the court's decision to stay AB's appointment as co-attorney on 20 April 2023, he continued to take funds from EF's account for his own use without seeking permission of the court or his brother CD, the co-attorney. In addition to discharging AB as attorney, Ms Watson was discharged as Controller, and CD was permitted to act as the continuing attorney.

[16] On 19 March 2024, AB lodged an EP3 application with the High Court, seeking to be re-instated as EF's attorney. The grounds for this were set out in the appellant's written statement. They were as follows:

(i) The inaction and incapability of CD in managing EF's affairs;

(ii) The belief that AB should be reinstated as co-attorney, in line with his mother's wishes; and

(iii) a challenge to the decision to remove AB as attorney pursuant to Article 5 of the 1987 Order.

Following this application, Ms Watson was re-appointed as Controller ad interim by the High Court, to represent EF in respect of AB's application to be reinstated as EF's attorney.

[17] By way of a report dated 15 May 2024, Ms Watson recognised that while EF had expressed that she wanted AB to be re-instated as co-attorney with CD, she could not agree to this due to concerns that AB would continue to remove money from EF's account for his and his family's benefit. Ms Watson also noted concern that CD seemed to have dis-engaged with the court process and may be unwilling or unable to fulfil his duties as an attorney. However, she noted that EF's bank has not raised any concerns regarding CD's management of the bank accounts, and at present, EF's needs were being met.

[18] Ms Watson suggested that AB make a formal application, accompanied by a Statutory Will application, for a reasonable payment from EF's Estate to be used for the benefit of her grand-daughter's education. This she said should be served on both CD and AB's wife, as beneficiaries to EF's will.

[19] In AB's statement of response, dated 16 May 2024, AB contended that Article 5(4) of the 1987 Order enables the attorney to benefit himself or other persons than the donor, if the donor might be expected to provide for their "needs." On that basis, AB submitted that EF would agree to pay his mortgage, finance her granddaughter's education, and offer him gifts of a car and motorcycle.

[20] The appellant forwarded a further statement dated 22 May 2024. Attached to this statement was a letter from a Dr Nirodi, which was intended to illustrate that AB's mother could consent to AB's use of her funds. This report did not contain any assessment as to her capacity to give consent or make decisions of this nature.

[21] On 23 May 2024, Master Wells conducted a hearing which was attended by AB, one of his daughters, Ms Watson, and an assistant care manager of the South Eastern HSC Trust, as well as EF. CD did not attend the hearing.

The judgment of Master Wells

[22] In her judgment, Master Wells noted that EF's present state had resulted in her losing capacity to manage her property and affairs. She also found that EF had limited capacity to give informed consent to significant financial gifting in these circumstances and is in need of additional safeguards to protect her. Master Wells refused to reinstate AB as EF's attorney for the following reasons:

(a) AB did not accept the court decision of 16 June 2023;

(b) AB does not see anything wrong with using a significant amount of the funds for his own benefit;

(c) AB interprets Article 5 of the 1987 Order to mean that there are no financial limits to the amount of his mother's funds he can spend on himself and his personal projects;

(d) He believes if he is reinstated as co-attorney with CD, he can act as a sole attorney without engaging or speaking with his co-attorney; and

(e) He repeatedly submits to the court that his mother consents and approves his use of her money for himself and his family without restriction.

[23] AB lodged a notice of appeal on 29 May 2024, requesting a variation of the order and to be re-instated as joint attorney of EF without any restrictions. In his statement attached to the notice of appeal, one issue raised by the appellant was Master Wells' belief that EF lacks capacity to participate in decision-making, which the appellant contended was contrary to the opinion of Dr Nirodi in her letter.

[24] In reply, the respondent, Ms Watson, reiterated her position that AB is an unsuitable attorney as he has breached his fiduciary duty under Article 5 of the 1987 Order, he has shown no remorse for doing so, and he continues to believe that EF approved and consented to these transactions.

[25] On 3 July 2024, AB forwarded further statements for the attention of the appeal judge Mr Justice McFarland in advance of the High Court hearing. He attached copies of his father's signed will. He submitted that the will empowers the trustees to make use of the estate for whatever purpose they deem fit, with the only restriction being the limit of the trustee's entitled division of the estate. He submitted that he is therefore entitled to use the estate and stated that is the reason why a spreadsheet was set up between himself, his mother and his brother CD to keep an account of monies expended which would then be offset against each party's share of the remaining estate.

The appeal hearing and decision of McFarland J

[26] The hearing of AB's appeal took place before the judge on 8 July 2024. In essence, the main argument advanced by AB was that he was entitled to transfer money to himself from EF's funds pursuant to Article 5(4) of the 1987 Order. He contended that his mother had capacity to approve the payments. He said that his actions were reasonable given the size of his mother's estate (in excess of £1 million) and given her expressed intentions set out in her will. Following the hearing, the judge reserved the judgment.

[27] In his judgment, the judge noted that the focus of the appeal was against Master Wells' decision of 23 May 2024 not to reinstate AB as an attorney. The judge found that it was not open to AB to revisit the decision of 16 June 2023 wherein the Master removed AB as an attorney, which he did not appeal at the time. Thus, the judge worked on the basis that Master Wells was required to evaluate at the hearing on 23 May 2024 whether there had been any developments since 16 June 2023 when AB was held to be unsuitable as an attorney for his mother.

[28] In assessing the intervening events, the judge noted that a worrying intervening event was CD's lack of engagement, which had resulted in EF's financial affairs being left at a standstill. He considered there to be two potential resolutions to this. Firstly, re-instating AB as an attorney or, if that was not appropriate, the appointment of an independent controller under the provisions of Part VIII of the Menal Health (Northern Ireland) Order 1986 and Order 109 of the Rules of Court of Judicature.

[29] In consideration of the first option, the judge noted that AB's insistence that he hadn't done anything wrong had continued from the hearing before Master Wells, to the hearing before the High Court. He evaluated AB's contention that Article 5 of the 1987 Order demands a wide interpretation of the words "needs" and "might." He held that interpretation of these words should be considered in light of the purpose and wording of the legislation on the whole, as well as Parliament's intention. Having directed himself in this way he found no justification for the wide interpretation suggested by AB.

[30] The judge recognised that AB's decision to move to Northern Ireland to care for his mother might result in a reduction in his income. Accordingly, he acknowledged that certain payments might fall within the category of Article 5(4) of the 1987 Order. However, he found it difficult to see the discharge of an entire mortgage was justified in these circumstances.

[31] Furthermore, the judge noted AB's failure to see how the transfers of money would impact on other family members who EF had intended to benefit in her will. He found that this presented an even more compelling reason against reinstating AB as an attorney, as steps will have to be taken to protect the interests of CD, AB's wife, and the second granddaughter.

[32] On the issue of capacity and the letter of Dr Nirobi, the judge noted that it was not a report prepared for court proceedings, and it lacked the required expert's declarations. The document also provides no opinion that his mother does not lack capacity.

[33] The judge found the contention that EF had appointed AB and CD as trustees, entitling them to exercise powers without restriction during his mother's lifetime, as false, as the will does not become effective before his mother's death.

[34] Finally, the judge noted that AB remained consistent in his belief that everything he has done has been appropriate. Therefore, the judge's overall view was that Master Wells was correct to determine that AB is an unsuitable person to manage his mother's affairs, and her decision was entirely appropriate and could not be criticised in any way.

Subsequent developments

[35] During the period from the judge's decision on 19 July 2024 to the present, there have been several other intervening factors which merit the court's comment as follows.

[36] On 5 August 2024, the High Court issued an order discharging CD as attorney of his mother's property and affairs due to his breach of authority under Article 6 of the 1987 Order. The operation of the Enduring Power of Attorney was stayed pending the outcome of AB's appeal. Ms Watson was appointed as Controller ad Interim on behalf of EF to deal with her financial affairs. As Controller ad Interim, Ms Watson is authorised to operate EF's bank account with the same fiduciary duties as if assuming the role of trustee, for the benefit of the patient EF. She is also required to liaise with the patient's social worker, and with AB to agree upon a weekly budget for day-to-day expenditures.

[37] On 30 September 2024, the appellant AB, lodged a Form EP3 with the High Court, applying for an order that required the assessment of the capacities of the

donor to make an informed decision. The grounds for this were that no assessment of EF's capacities had been undertaken by a court appointed, independent practitioner.

[38] On 16 October 2024, in response to AB's EP3 application dated 30 September 2024, the court invited Ms Watson to commission a capacity report in respect of EF. (As an aside it now appears that AB may in fact want to withdraw this application).

Summary of the arguments on appeal

[39] In this appeal, AB seeks an order to be reinstated as attorney to EF.

[40] In the accompanying statement attached to the appellant's notice of appeal, he indicates several issues supporting his grounds for appeal. Following this, the appellant submitted a skeleton argument entitled "court of appeal case management review", in which he builds on the arguments set out in his accompanying statement. These we summarise as follows:

(a) Concerns that EF's capacity to make an informed decision has not been assessed, and requests for an opinion from a suitable mental health expert. The appellant also challenges the lack of weight given to Dr Nirodi's letter.

(b) Many observations and criticisms of the judgment of Mr Justice McFarland. In summary, the main criticisms advanced by the appellant are:

    (i) The judge's indication that the appeal concerned Master Wells' May 2024 decision, rather than the June 2023 decision.

    (ii) Rejection of the judge's interpretation of the 1987 Order, in particular the interpretation of "needs" and "might." The appellant submits he has not breached Article 5 of the 1987 Order, as he is entitled to use the donor's money should they be expected to provide for their needs. "Needs" should be interpreted to include physiological needs.

    (iii) The lack of weight being given to family values and the appellant's military values.

    (iv) His contention that his mother would have agreed to the transfers of money, as she would want to provide for his needs, by gift or otherwise, and his daughter's educational needs. This is supported by submissions that his parents have previously offered him with considerable financial assistance.

    (v) His contention that he is suitable and capable of being EF's attorney and has not breached Article 5 of the 1987 Order.

(vi) Issues with how his parents' will is addressed, the relevance of inheritance tax, and assertions that his mother's estate is capable of affording AB's spending.

Given that AB is a personal litigant, we will treat all of the above as effective grounds of appeal.

[41] In reply to the above grounds the first respondent submitted to us that many of the criticisms of the judgment under appeal do not refer to any material evidence. The first respondent disagreed with the appellant's submission that the donor has capacity to make decisions. In any event, the first respondent maintained that AB's wish to be reinstated as attorney runs contrary to the contention that, at the time of registration of the EPA, the donor lacked capacity.

[42] We can deal with some of the grounds of appeal summarised above in short compass as follows. First, we consider that ground (b)(i) is unmeritorious , as the judge was correct in limiting his judgment to a review of the Master's May 2024 decision. This was the decision appealed by AB. He cannot now appeal the previous decision which was made almost a year before without good reason for the delay for which he has provided no convincing reason to us. We also consider that there is no legal basis to the argument concerning the lack of weight given to "family and military values" comprised in (b)(iii). Similarly, the execution or interpretation of a statutory will, while considered by the judge, was relevant in the context of the hearing. However, this is not relevant to the appeal, and so ground (b)(iv) is dismissed. The remaining grounds of appeal will be addressed in turn in the subsequent sections namely (a) and (b)(ii), (b)(v) and (b)(vi) after we discuss the relevant law in this area and appellate principles.

Consideration

[43] To begin, it is important to state that the role of the appeal court is to review the decision of a lower court rather than proceed by way of re-hearing (see *Colm Cameron's application* [2024] NICA 14 at para [6]; *H-W (Children) No 2* [2022] UKSC 17, at para [48]). The court will intervene only if after a review of the trial judge's findings, it considers that the judge was wrong. This principle has been upheld in *H-W* and in *Re Lancaster, Rafferty and McDonnell's Application for Judicial Review* [2023] NICA 63, at para [17].

[44] Encapsulating the point, in *Re B (A Child)* [2013] 1 WLR 1911, Lord Wilson stated at para [53]:

> "Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there

> was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it."

[45] Thus, the question before the court in the present appeal is whether the judge's conclusion and decision on 19 July 2024 to dismiss the appellant's appeal was correct. The appellant has raised various concerns with the judge's findings, which have been summarised at para [40].

[46] One of the appellant's grounds of challenge which remain for us to determine in this appeal is point (a) that there has been no medical examination to determine the donor's mental capacity to consent and agree to his actions. At the hearing before the judge, the appellant sought to rely on a letter from Dr Nirodi supporting the assertion that his mother can express consent to his withdrawing large amounts of funds from her account for his and his family's benefit.

[47] The appellant contended that his mother would have given consent to these payments, as she has previously provided him with considerable financial assistance. This he said included £80,000 as a down payment for the purchase of an apartment in 2003, and €150,000 in 2016 to assist with securing a mortgage, although this money was returned once the mortgage was secured. The appellant's submission was therefore that his mother would have approved of the payments he has taken from her account to benefit himself and his family.

[48] In this vein, the appellant lodged an EP3 application at the High Court on 20 September 2024 seeking an assessment of his mother's capacity. The High Court issued an order on 15 October 2024 directing Ms Watson to commission a report. We, therefore, observe that this matter is before Master Wells.

[49] Dealing with the above, we remind ourselves that the issue of mental capacity should be viewed in light of the overarching purpose of an EPA. AB and his brother CD applied to the court on 26 November 2021 to register the donor's enduring power of attorney on the basis that she was becoming mentally incapable of managing her affairs. The relevant section which gave them authority to do so is provided by Article 6(1) of the 1987 Order. It states:

> "6.—(1) If the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable paragraphs (2) to (6) shall apply."

[50] "Mentally incapable" is interpreted in the introductory section of the 1987 Order, which states:

> "'mentally incapable' or 'mental incapacity', except where it refers to revocation at common law, means, in relation to any person, that he is incapable by reason of mental disorder of managing and administering his property and affairs and 'mentally capable' and 'mental capacity' shall be construed accordingly."

[51] It is important to note that the legal basis of registering the EPA was that the donor, EF, was becoming mentally incapable of managing her affairs. This position should be considered in light of the appellant's contention that his mother does in fact have capacity to consent to and approve of his large withdrawal of her funds. Should a medical assessment find that she has capacity to consent to these payments, then the EPA would no longer be required. Recognizing the logic of this, AB did not pursue this point with any vigour before us. Therefore, we find that the ground of appeal comprised in ground (a) above relating to a mental capacity assessment has no substantial basis on appeal and is dismissed (bearing in mind that Master Wells is seised). In addition, we agree with the judge's assessment of the weight to be given to Dr Nirodi's letter.

[52] Next is a matter of interpretation of the governing legislation. This issue also engages appeal point (b)(ii) and (b)(v). In a nutshell the appellant contends that Article 5(4) and (5) of the 1987 Order authorises him to withdraw large funds from the donor's bank account to benefit himself without the need for court approval based upon his needs. Article 5(4) and (5) provide:

> "5.—(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."

[53] In interpreting the word "needs" and "might" in the context of Article 5(4)(a), the judge referenced the observation of Denning LJ in *Seaford Court Estates v Asher* [1949] 2 KB 481, where he observed that the English language is "not an instrument of mathematical precision." The judge also referenced the case of *Ex p Spath Holme Ltd* [2001] 2 AC 349, in which Lord Nicholls indicated that "statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

[54] In *JR222 application for judicial review* [2024] UKSC 35, the court reiterated at para [73]:

> "The courts in conducting statutory interpretation are seeking to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision."

[55] It is an accepted principle of law that words and passages in a statute derive their meaning from the wider context and purpose of the legislation. This was also confirmed in the case of *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at para [29].

[56] The judge did not divert from the above statements of principle. In reaching his decision he took into account the context and referred to the Law Commission report titled "The Incapacitated Principal" (July 1983 Law Com. No. 122) as a guide for establishing the overarching rationale behind the policy that was later adopted by Parliament when the EPA was enacted. He noted that "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."

[57] The judge then considered the words "might" and "need" in light of the full phrase in the legislation at Article 5(4)(b) and found that the appellant's interpretation was unnecessarily wide. That is because the appellant maintained the submission that he has not superseded his authority under Article 5(4) and (5) of the 1987 Order by making payments totalling in excess of £250,000 from his mother's account for his and his family's benefit. He contends that on the contrary, Article (4) and (5) of the 1987 Order enables him to do so. We do not agree.

[58] Such a wide interpretation of the legislation as canvassed by AB is not justified when one considers the legislation as a whole and its general purpose. The meaning 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. We agree with the judge that it could never have been Parliament's intention to allow for such a wide interpretation. 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. We agree with the judge's analysis on this issue.

[59] We also agree with the judge's interpretation of the wording of the legislation in that it permits payment if it is a payment which falls within a range of decisions that EF, if she had capacity, could have made. To decide that question, all of the relevant circumstances have to be taken into account. This is an intensely fact sensitive exercise the outcome of which will depend on the facts of a particular case.

[60] *Cretney & Lush on Lasting and Enduring Powers of Attorney* (2017) section 18.21, when dealing with mirror provisions in England & Wales, suggest the following three questions in the absence of an express provision in the instrument creating the power of attorney:

(i) First, is the provision in question required to meet a need of the person benefited?

(ii) Secondly, might the donor be expected to provide for that person's needs?

(iii) Thirdly, what might the donor be expected to do to meet those needs?

[61] Returning to the facts of this case, we accept that AB's decision to come to Northern Ireland to care for his mother meant that he had needs due to a reduction in his income. Consequently, we can see that certain payments might fall within the permitted category in Article 5(4) of the 1987 Order. The judge made the following factual findings on this issue:

> "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."

We see no reason to disturb this factual finding.

[62] However, a careful analysis would be required to consider clearance of an entire mortgage as against mortgage payments on a periodical basis and consider the other types of payments that arise in this case. Furthermore, that analysis cannot be made solely by AB, the recipient of most of the payments and the court has a role under the 1987 Order.

[63] For instance there are certain questions to be asked in relation to whether EF might be expected to provide for the appellant's adult daughter's education. This issue has been considered in *Cretney and Lush* albeit in relation to the England and Wales legislation equivalent. The authors write:

> "**18.23** Even if the provision in question is to satisfy someone's needs, the attorney may only act if the donor might be expected to provide for them. Suppose, for example, that the question is whether provision should be made towards the further education or training of the donor's adult child. First, it would have to be established that such provision constituted a need. Secondly, it would have to be asked whether this particular donor might be expected to provide for the needs of that child. And thirdly, it would have to be asked what this particular donor might have been expected to do to meet that need. […]
>
> **18.24** MCA 2005, Sch 4, para 23(2) provides that any question as to what the donor might be expected to do shall be determined by assuming that he had full mental capacity at the time but otherwise by reference to the circumstances existing at that time. It would seem, therefore, that the donor's personality and preferences should be taken into account."

[64] It is clear, from the above, that the education of the appellant's daughter would have to constitute a need. It must then also be asked whether the appellant's mother would be expected to provide for the appellant's daughter's needs. Applying the authority of *Re Cameron (deceased)*, *Philips v Cameron & Others* [1999] 2 All ER 924, education expenses we see that could be a need under the 1987 Order (with vouching

evidence). Therefore, whilst we can see that question (i) at para [60] herein could theoretically be answered in AB's favour there is no evidence to satisfy the further two questions which have to be asked as to the donor's intentions.

[65] Of course, there were other large expenses in this case, paid to AB including £178,600 which went towards clearance of his entire mortgage which we have discussed above, his personal loans, a car and other "personal necessities." There is no principled basis or evidence put forward which would bring this expenditure within the scope of the 1987 Order. Overall, on the facts, we find, in agreement with the judge that on the evidence this level of expenditure does not satisfy the requirements of Article 5(4) in that it cannot be said that the money was for a need or that the donor might be expected to provide for that need in the way it was provided for by AB. Finally, we cannot see that any of the payments are gifts given the strictures placed upon gifts within the terms of Article 5(5).

[66] There is also a ring of truth in what Mr Colmer states in his additional submission that the general practice of most solicitors is that if there are payments or gifts to be made by attorneys in excess of the annual gift allowance of inheritance tax purposes (currently £3,000) under either Article 5(4) or 5(5), it is prudent to seek authority of the court. We agree with that proposition absent some clear and unequivocal agreement for payment out made by the donor. In this case, as AB accepted, there was no clear agreement. All he could refer to was a conversation that he said took place with his mother some time ago.

[67] While the appellant also submits the Excel spreadsheets dated April 2022 and March 2023 are supporting evidence to the alleged verbal agreement between him, his mother and his brother, we do not consider this to be sufficient.

[68] In this regard it is worth noting that the Excel spreadsheets were created by the appellant and forwarded to his brother. There is no evidence within these spreadsheets that his mother had agreed to dividing the assets in this way. Moreover, the spreadsheets were dated April 2022 and March 2023, which is after the enduring power of attorney had been registered in November 2021. Therefore, even if the appellant's mother had received the Excel spreadsheets, there would need to be assessment of whether she agreed to the contents. This is not sufficient evidence of intent when sums as large as those in play in this case are at issue. This deals with ground (iv) of appeal which is also dismissed.

[69] The consequence of what we have found is made plain in *Re AB (Revocation of Enduring Power of Attorney)* [2014] EWCOP 12. In that case the court held that the respondents had acted outside their EPA powers in respect of their Aunt, X. The respondents, M and W had used X's funds for their own interests, including making a gift of £15,000 to their mother for purchasing a car, loans totally £50,000 to their brother, and an unaccounted-for cash expenditure of £32,667. While this was going on, M and W had additionally been failing to pay X's care home fees. The court held

that M and W had contravened their authority and behaved in a way that was not in X's best interests. At [29] Senior Judge Lush states:

> "Generally speaking, any attorney acting under an EPA who has behaved, or is behaving, or proposes to behave, in a way that contravenes his authority or is not in the donor's best interests is likely to be unsuitable to be the donor's attorney."

[70] Moreover, at para [40], Senior Judge Lush underscores the fiduciary duties of an attorney, referencing the Mental Capacity Act 2005 Code of Practice, para 7.60, which states:

> "A fiduciary duty means attorneys must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. They must also not allow any other influences to affect the way in which they act as an attorney. Decisions should always benefit the donor, and not the attorney. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the Act allows it, whether or not it is at the donor's expense."

[71] Similar principles apply in Northern Ireland. Thus, it is clear to us, that while Article 5(4) and (5) provides for the attorney to benefit himself or persons other than the donor, this is not open ended. In this case the donor obtains no clear benefit from AB's spending. AB's belief that his spending is justified under Article 5 of the 1987 Order and his failure to see any issue with his conduct supports the findings of the judge and Master Wells that he is an unsuitable attorney. The appellant's submission that he is a suitable attorney, that he has not contravened Article 5, and his request to be reinstated as attorney cannot stand.

[72] In addition we note that pursuant to Article 10(1) and (2)(e) of the 1987 Order, the court is granted a function 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). Article 10(4)(g) is particularly relevant in this case and was referred to by the judge in his judgment. This 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."

[73] The appellant submitted that there was no need for the judge to consider this Article, since there was no breach of Article 5. However, Article 10 is relevant to the context of the case, given it was the legal basis employed by Master Wells in making her decision to remove AB as an attorney. We consider that she was entitled to do so on the facts of this case.

[74] Finally, whilst we understand the argument advanced by AB that the estate at present can withstand the spend made and that his share would be debited, we do not think this solves the problem in this case given the fact that there are other beneficiaries. We agree with the judge that 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.

Conclusion

[75] This case is fact specific and has been determined on its facts. We understand AB's position that he has been obliged to move from France to Northern Ireland to care for his mother. That is commendable given the care needs his mother has which are being undertaken very well. As a result of his choice AB has clearly made sacrifices. He has to maintain himself thus creating needs. However, the question in this case is whether he could properly spend £250,000 from his mother's estate on the basis of need.

[76] There is no convincing reason why we would extend time to effectively allow an appeal from the original Master's decision or overturn her second decision which was upheld by the judge. We find no reason to depart from the factual findings of the judge in this case.

[77] Accordingly, applying the applicable appellate principles, we dismiss this appeal and uphold the decision of Mr Justice McFarland. In doing so, we stress that there is no restriction on further applications being made to the Master by AB as controllership continues and the matter is before the Master. We hope that Ms Watson will also suggest practical ways of solving some of the issues that have arisen in this case.

[78] We will hear from the parties as to costs.

Postscript

[79] After the judgment was delivered an application for costs was made against AB. We afforded him one week to respond in writing. Rather than abide by our direction AB took the opportunity to present 78 paragraphs of comment on our

judgment with only paragraph [78] relating to costs. It is not appropriate for any litigant to correspond in this way. We have corrected the typographical errors that have been identified by AB and the respondent. In addition, we see no reason why costs should not follow the event. We stress, again, that AB can make an application to the Master who is currently seised of this case as to any relevant matters he may have including income needs.