

THE HIGH COURT

[2024] IEHC 238

EPA: 1305/2023

**IN THE MATTER OF THE POWERS OF ATTORNEY ACT 1996, AND IN THE
MATTER OF AN INSTRUMENT CREATING AN ENDURING POWER OF
ATTORNEY EXECUTED BY A DONOR ON THE 28TH DAY OF MAY 2014**

E.M.

Applicant

-AND-

M.M.

Respondent

Ex tempore ruling of Mr. Justice Heslin delivered the 11th day of April 2024

1. On the 28th of May 2014 an Enduring Power of Attorney ("EPA") was executed by Mrs. M.M. whom I will refer to as the "Donor". A copy of this EPA comprises an exhibit to the affidavit sworn on the 12th of February 2024 by Ms. E.M., who is a daughter of the Donor, and I will refer to her as the Applicant. As is clear from the terms of the EPA the Donor appointed her husband as her attorney and in the event of him being unable to fulfil that role, the Applicant (that is the respondent's daughter, Ms. E.M.) was named as attorney. Unfortunately, [the Donor's husband] passed away on 7 June 2023.

Report by Professor M. – 12 September 2023

2. Professor M. is a consultant geriatrician and associated professor of medicine with the Royal College of Surgeons in Ireland and on the 12th of September 2023 Professor M., who assessed the respondents capacity on the 6th of September 2023, stated the following:-

"I wish to confirm that I assessed the above lady at the geriatric medicine day hospital [and the address is given] on the 6th of September in order to assess her suitability for enactment of her previously completed enduring power of attorney. The duration of her assessment was thirty minutes. I am a consultant geriatrician since 2003 and entered on the Irish Medical Council specialist register since 2003 in the divisions of geriatric medicine and general internal medicine. The above date, the 6th of September 2023, is the first date I have assessed [the Donor]."

3. The professor then speaks of the functional 'tools' used, in what was clearly a structured approach to the assessment of capacity, and I quote;

"the nature of the examination carried out was a clinical history and a cognitive assessment, namely the mini mental state examination or 'MMSE'. She scored 19 out of 30 on MMSE testing. [The Donor] had evidence of significant executive dysfunction on bedside testing, with impaired verbal category fluency and abstract reasoning. She has impairments in several domains of cognition, important for management of property and financial affairs, including temporal orientation, attention, and short-term memory. She could not demonstrate an awareness of simple financial affairs management or how she would seek assistance in managing same. In view of this, it is my opinion that [the Donor] is no longer able to understand, retain, and weigh up information about her financial and property affairs. Therefore, it is my opinion that she is of unsound mind and not capable of managing her affairs."

4. I pause to say that reference to an inability to understand, retain, and weigh up information speaks directly to the first three of the four aspects of functional capacity assessment. Professor M.'s report continued *"the nature of [the Donor's] illness is Alzheimer's type dementia. The likely date of onset for [the Donor's] symptoms is from before 2022. The symptoms that pertain to this illness are amnesia, apraxia, and agnosia. The evidence for this diagnosis is cognitive testing and clinical assessment. This condition should be considered to be permanent, progressive, and irreversible. In view of the above, it is my opinion that it is appropriate to enact her previously completed Power of Attorney"* and a signed copy of Professors M.'s opinion comprised exhibit EMC3 to the Applicant's supplemental affidavit, as sworn on the 28th of February 2024.
5. In November last, the Applicant, as attorney, gave notice of intention to apply for the registration of the EPA and, among other things, this notice of application for registration referred to Professors M.'s report, which I have quoted from extensively. Notice was served on all relevant parties.

Objections by the Donor and her son

6. The Donor herself and her son, Mr. G.M., objected to registration of the EPA. In an affidavit sworn on the 4th of January of this year the Donor makes averments to the following effect: that she was ill prepared for the assessment by Professor M.; that were it not for her fragile state of mind at the time she would have achieved a better result; and she regards herself as capable of managing her own affairs and wanting to retain full control of same.

Report by Professor G. – 19 October 2023

7. The Donor also averred that she requested a visit and assessment by Professor G., who is a professor of cardiovascular medicine in [an institution], recently retired. The exhibit to the Donor's affidavit comprised of an unsigned copy of a 19th of October 2023 letter to the Donor which referred to Professor G. meeting with her and her son on the 16th of October. This letter states *inter alia*:- *"None of us has a perfect memory as we get older but you talked with great clarity. I note for the record that you are completely independent with regard to the demands of daily living, are fully mobile indoors and out and that you enjoy both housekeeping and*

cooking and that you value your independence. Also that you have a keen interest in astronomy and art. I understand that [the Donor's son] helps with driving and shopping and that most of your household bills are now dealt with by direct debit. It was of interest to see your spotlessly clean, neat and well organised house. You are fully competent at this time to decide how much extra help, if any you need. While I am sure that you will appreciate suggestions, it is your right to avail of them or not, now or in the future." Later, in the third last paragraph, Professor G. states *"in my opinion you are of sound mind and can and should decide your destiny."* I will presently return to Professors G.'s views to contrast the reasoning underpinning the views expressed and the analysis, which is evident from a comparison of the reporting by the two professors which I have referred to thus far.

Report by Dr. R. – 9 November 2023

- 8.** Meanwhile, I note the contents of an affidavit sworn by the Applicant on the 12th of February in which the Applicant avers *inter alia* that she first began to notice a deterioration in the Donor's cognitive function well before the formal assessment carried out by Professor M. and prior to her late father's passing. The Applicant also exhibits, among other things, a 9th of November 2023 report by Dr. R. who has been the family doctor since 2011 and it is fair to say that the contents of that report by Dr. R. are entirely consistent with the reporting by Professor M.
- 9.** A theme which runs through the report by Dr. R. is the gradual decline in cognitive functioning of the Donor and lack of insight into same. For instance, and with reference to the Donor's attendance at the G.P. surgery on the 9th of October 2023, Dr. R. states: *"she had very little insight into her cognitive decline and poor short-term memory."*
- 10.** Later, Dr. R. reports the following *"I phoned [the Donor] on the 19th of October 2023 and asked her to book in with me this week to reassess, formally, her cognition. She was not keen on having her mental test score reassessed with me and asked me to tell her what questions I would ask so that she could practise them. I introduced myself by name on the phone. She clearly recognised me at the start at the conversation and called me by my name and would know my voice well over the years but by the end of the conversation she asked me who she was speaking to and told me she thought I was the secretary. She has not booked in to be seen so far, she was due to return to see geriatrician [Professor M.] on the 17th of October 2023. She refused to go to the appointment and said she would call the Gardaí if she was brought to a geriatrician or if anyone called to the house."*
- 11.** Later in the report by Dr. R. she states in summary *"[The Donor] is an extremely pleasant dignified 88 year old widow with cognitive impairment related to dementia since approximately December 2022"* and she concludes her report by stating *"I believe the EPA should be registered"*.

Affidavit sworn by the Donor's son

12. I have also noted the contents of an affidavit sworn by Mr. G.M. [the Donor's son] on the 23rd of February of this year. Although, plainly not a doctor, Mr. G.M. shares the views expressed by Professor G. He is also of the view that the Donor is capable of keeping her home and retains an interest in art and astronomy and he objects to the application for registration on the grounds that the Donor is *not* mentally incapable and today, through his solicitor, seeks that the court would direct a further assessment. I have already declined that application but this ruling amplifies the reasons why I am entirely satisfied that no such further assessment would serve any purpose.

The Donor's averments

13. To continue with the ruling, and speaking to the evidence before court, the Donor swore a further affidavit on the 21st of February. In substance, it confirms that certain payments and withdrawals were made with her authority, that she does not wish to lose control of her affairs, and that she denies losing capacity. Looking at the medical evidence so far discussed, the following observations seem to me to be appropriate.

Specialism

14. Leaving aside entirely that Professor G. is retired and placing no relevance on the fact that his letter is unsigned, it is true to say that his specialism is in cardiovascular medicine, whereas Professor M. is a consultant geriatrician. The latter specialism would seem to me to allow for somewhat greater weight to be accorded to Professors M.'s views.

Structured approach

15. Furthermore, in the manner explained, Professor M. carried out a very structured approach to cognitive testing and, in addition to clinical history, he employed a specific cognitive testing approach using the mini mental state examination, which is a standardised 'tool' in cognitive assessment. By contrast, Professor G. makes no reference to any such approach, He does not appear to have employed the MMSE or any other cognitive assessment tool, and he certainly makes reference to none. This also seems to me to allow for greater weight to be attributed to Professor M.'s opinion.

16. In addition if one looks at the reasons underpinning the conclusions which Professor G. expresses they seem to net down to the following: (i) nobody has a perfect memory as they get older; (ii) the respondent talked with great clarity; (iii) she is independent regarding the demands of daily living; and (iv) she retains a keen interest in art and astronomy.

Functional assessment – 4 elements

17. Without intending any disrespect whatsoever, Professor G.'s report simply does not engage with the four elements of capacity. This also seems to me to allow for significantly greater weight to be placed on the views expressed by Professor M., bearing in mind the focus, including of legislation, on a functional approach to the assessment of capacity, in particular,

the recently introduced Assisted Decision-Making (Capacity) Act of 2015. At the risk of repetition, the four elements of capacity on a functional assessment are: first, the ability to understand information relevant to a decision; second, the ability to retain that information long enough for the purposes of forming a view; third, the ability to weigh up and use that information in the context of balancing alternatives relative to the decision; the fourth element being the ability to communicate. It is simply an uncontroversial observation to say that, whereas Professor M. engages directly with all four elements, Professor G. engages with none. This allows me again, without any disrespect intended, to place, in a material sense, far greater weight on Professor M.'s assessment.

Donor's instructions not to release Professor C's report

18. In an affidavit sworn on the 21st of February Mr. Michael Kennedy, who was then solicitor for the Donor, averred that he requested a further assessment of the Donor by Professor C., being a geriatrician recommended by Professor G. and, as was explained when the matter was opened before lunch, it is clear that Professor C. carried out an assessment on the 6th of March. It is equally clear that, on receipt of that assessment, Michael J. Kennedy & Co., solicitors for the Donor, were given instructions not to release that assessment to anyone. Therefore, the solicitors for the attorney did not receive a copy, despite requesting it. I directed that a copy be made available.

6th March 2024 assessment

19. It is appropriate to quote from this latest reporting, which is dated the 7th of March, prepared by another consultant with a relevant specialism similar to Professor M., namely geriatric medicine, and in this report Professor C. confirms that he carried out the review of the Donor on the 6th of March. The following are certain verbatim quotes from his report: *"When asked specifically about the existence of an Enduring Power of Attorney (EPA), [the Donor] did not immediately recollect the existence of such an instrument or having ever made one but, with a prompt, recollected that she had in fact made an EPA with her husband, now deceased, and was aware that her daughter was her named attorney on the document."*

20. Later, Professor C. reports that the respondent reported her address *"and that the house was a bungalow style house and beautiful and well laid out and when asked, cited its value as 'many thousand'. She might accept an offer of €50,000 for it she said, if she was selling, but that she could be wrong in this. She admitted she would need help now with all financial matters and was vague on how she would pay a bill or indeed how much her domestic bills might be and told me that 'her son...handles all the big bills'. She said that [the Donor's son] now did all the shopping and handled all the things that... her deceased husband, would have done."*

21. Professor C. goes on to state, *"I performed a Montreal cognitive assessment in which she had great difficulty on visuospatial, short term recall, concentration, and orientation subsets. She scored 9 out of 30 overall and 0 out of 5 on recall and 1 out of 6 on orientation subsets. Her*

performance was quite poor but probably consistent of my overall impression of her cognitive status. There did not appear to be a remedial physical cause for her poor cognitive performance."

22. The opinion to which Professor C. came for the reasons I have just quoted, is as follows:- *"My overall impression is that this lovely lady is cognitively vulnerable and is most likely suffering from dementia. I understand from the medical reports previously obtained that this may have been diagnosed or at least suggested by another geriatricians review previously"* and he underlines the following sentence *"based on my interview and assessment today it is my opinion that she would not be able to manage her affairs currently and I do not think this is a reversible situation."*

23. He continues, *"it is likely that she is suffering with a dementia, in my opinion from interview and examination, most likely Alzheimer's type or a mixed vascular Alzheimer's type"*. Later still, in the penultimate paragraph, Professor C. states:- *"I feel she cannot manage her affairs and this will not change going forward and therefore it would be appropriate to register an existing Power of Attorney such as was executed legally when the patient was compos mentis."*

24. What emerges from the forgoing is that, not one, but two consultant geriatricians, both of whom on separate occasions took a formal approach to functional assessment of capacity, have reached materially identical conclusions, and if anything the situation has deteriorated. Furthermore, the Donor's G.P. of longstanding has expressed views which are entirely concordant. Therefore there are three clinicians, all of whom have offered evidence which is entirely supportive of the registration proceeding. Indeed, the most recent of the clinicians is someone who conducted the examination, essentially at the behest of the Donor, being a clinician identified, in effect, as the Donor's preferred choice. By contrast, there is simply a view, doubtless offered in good faith but, for the reasons given, a view which must be accorded significantly less weight.

Refusal of application by Donor's son for further capacity assessment

25. For the reasons given, there can be no useful purpose served in circumstances where a professor identified by the Donor has reported on capacity, in going further and looking for yet another view. The evidence overwhelming supports the registration at this point in time and that's the decision of the court and the reasons for it.