THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 250

Record No.: 2019/520

Donnelly J.
Noonan J.
Murray J.

BETWEEN/

C.A.

APPLICANT/ APPELLANT

- AND –

B.W. & M.A.

RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered on the 22nd day of September, 2020

1. The central issue in this case concerns the basis on which a court should exercise its jurisdiction under s. 12(2)(b)(iv) of the Powers of Attorney Act, 1996 ("the Act") to give directions as to a personal care decision taken by an attorney under an Enduring Power of Attorney ("EPA") which has been registered in accordance with the provisions of the Act. The relevant provisions of the Act are cited in detail later in this judgment. In brief, s. 6 provides that personal care decisions made by an attorney shall be made in the donor's best interest. The section then lists certain matters to which regard must be had in deciding what is in a donor's best interests. Section 6(7)(c) states that in the case of a personal care decision made by an attorney, it shall be sufficient compliance with the requirement to make the decision in the donor's best interests if the attorney reasonably believes that what he or she decides is in the best interests of the donor. It is the interplay between s. 12 and s. 6 that lies at the heart of this decision.

Background

2. The background to this case is the development of symptoms of severe advanced dementia by the donor of the EPA amid an increasingly fractious dispute between his seven children. The appellant in these proceedings (the applicant in the High Court hearing) is the sister of the two respondents who are the attorneys under the EPA. Each is a daughter of the donor.

3. The affidavit evidence in this case sets out the painful history of increasing family disharmony. It is neither appropriate nor necessary to set out in detail the allegations and counter-allegations made in the various affidavits. In the course of this judgment, I will limit my reference to the details of those allegations to that which is strictly necessary and relevant to the decision I have reached and to an understanding of why I have reached that decision.

4. The donor in this case, now aged 92, had lived prior to the period at issue in these proceedings, all his life on a farm in the west of Ireland. He and his wife were married for 55 years and were the parents of seven children. His wife died in June of 2017. Up to that point, although his wife was ill, she was his primary carer.

5. In or about 2013, the appellant and her two adult children returned to live with her parents at the family home. She was involved in the care of her mother and father. The donor executed the EPA in April 2014. He named his two daughters, who live in Ireland but on the east coast, as his attorneys. In executing the EPA, the donor did not place any restrictions on the powers of the attorneys as is permitted under the Act.

6. In November 2017, the attorneys sought to register the EPA. In response, the appellant and other family members raised objections to the registration. On the 16th November, 2017, the objectors sent an email confirming that they would discontinue their objections if not pursued by the attorneys for costs. In the same email the objectors put the attorneys on notice that they would be withdrawing their contribution to the donor's care in the family home. This included their allocated time to care for the donor and also their financial support.

7. On the 4th December, 2017, the High Court ordered the registration of the EPA which took effect from the 15th January, 2018. The respondent attorneys are thus the jointly appointed attorneys under the registered EPA which had been lawfully and properly executed by the donor in accordance with the requisite legal procedures and safeguards. The attorneys did not pursue the costs at that point.

8. The attorneys organised care for the donor between the 29th November, 2017 and the 5th March, 2018 in his own home. There were paid-for carers from Monday to Friday on a 24-hour basis. The attorneys alternated weekends caring for him in the family home, coming from their own homes on the east coast to do so.

9. On the 5th March, 2018, the donor was moved to a nursing home in the east of the country. The attorneys said this was for respite care. Considerable dispute on the papers arises as to how and why this took place. There is no doubt however that neither the appellant nor other members of the family were told about the move until the donor had been taken to a nursing home. It also appears that the attorneys sought to restrict visits to the nursing home and that is a source of much contention. The attorneys say that this was in the context of seeking to have the donor settle into the home having regard to the effects of his dementia. There are also further disputes about alleged inappropriate behaviour by the appellant and a brother also living in the west of Ireland in terms of their attendances at the nursing home. Whatever may be the truth in that, it appears that the particular nursing home were unwilling to care for the donor any further.

10. On the 8th May, 2018 the donor was moved to a nursing home with a special dementia unit in the west of Ireland. Again, there is allegation and counter allegation made in the affidavits in respect of alleged inappropriate behaviour by the parties.

These Proceedings

11. On the 27th July, 2018, a notice of motion was issued on behalf of the appellant challenging the care decision made to place the donor in a nursing home. This was returnable to October 2018. The appellant had sought to appoint her own nominated geriatrician while the attorneys, having responded in detail to the claims made, sought the appointment of an independent medical visitor.

12. On the 22nd October, 2018 the High Court appointed an independent medical visitor to make recommendations regarding the care decision and the best interests of the donor. Some dispute arose as to the nature and context of the agreement by which the High Court came to make the appointment of an independent medical visitor ("the medical visitor"). It is unfortunate that this Court was not provided with the transcript of any of the initial hearings in this case. It does appear however that the President of the High Court was mindful that he could only appoint the medical visitor with the agreement and consent of the parties.

13. There certainly seems to have been an undertaking given to the court on behalf of both parties to be bound by the independent medical view and the recommendations made therein. An issue raised in this appeal was whether that was an agreement to be bound by the view of the medical visitor as to the best interests of the donor or whether the agreement was simply to be bound by his medical view. As the full transcript has not been placed before this Court, I have to take the agreed minimal position. Both parties accept that there was agreement to be bound by the medical view of the medical visitor. Indeed, it is striking that at the final hearing, no submissions were made contesting the medical views contained in the reports.

14. By his report dated the 2nd January, 2019, the medical visitor fully endorsed the care decision. On the 28th January, 2019 when the matter came back before the High Court, it appears that the President was satisfied that the donor was in an appropriate placement. At that point the President had an issue with regard to the donor's weight management as he had lost a significant amount of weight on entry into the nursing home. The President was however satisfied to give a direction that it was not in the donor's best interest to return to the family home.

15. When the matter returned in July 2019 to the High Court, the donor's weight had stabilised. A separate concern arose about the conduct of the appellant. It is neither necessary nor appropriate to detail that conduct, but I note that it quite legitimately gave rise to disquiet on the part of the President of the High Court.

16. The appellant refused to accept the views of the medical visitor and the matter was listed for hearing in October 2019. A second report was obtained which fully endorsed the care decision. A third report was also obtained in November 2019. The matter came on for hearing on the 21st November, 2019.

17. The hearing on the 21st November, 2019 was quite short. Counsel for the appellant raised with the High Court the question of whether the medical visitor had received both

the home care plan submitted by the appellant together with her submission. The report of the medical visitor had referred to receiving the home care plan submitted by the appellant and her co-signatories and that he had also received a submission from the attorneys. It appears that on an earlier occasion, the President had permitted both sides to make a submission to the medical visitor. The President had made it clear that he was not aware of the mechanics of transmission, whether to the medical visitor or to the Wards of Court Office. He said it was a matter for the parties to ensure. No further issue was raised on behalf of the appellant in light of that indication by the President. Counsel for the appellant submitted that her client was upset on behalf of her father "*but having said that the views are there and I don't think I can make any further submissions in relation to the matter, other than obviously in relation to costs*."

Other issues raised in this appeal

18. The appellant raised a discrete ground of appeal claiming a failure on the part of the High Court to ensure that the medical visitor had sufficient regard to the detailed written submission prepared by the appellant and other family members in support of the home care plan. To bolster this ground of appeal, the appellant has lodged subsequent correspondence with the medical visitor which the appellant submits fails to clarify unequivocally that the medical visitor had the submission in his possession. I am satisfied that this ground of appeal can be disposed of summarily.

19. This was not a ground which was pursued with the alacrity one would expect were it in reality a ground of substance. If this was a matter that was truly relevant to the final consideration of the matter, it ought to have been pursued and drawn to the attention of the court below in another manner. No adjournment or pause in proceeding with the case was sought and no submissions were made that any opinion of the medical visitor would be tainted by his failure to have regard to the submission. I am in any event satisfied that in the context of the information that was clearly before the medical visitor and the issues that he considered relevant, the written submissions in support of the care plan could not reasonably be considered to be matters which might have swayed his opinion and in turn that of the President of the High Court.

20. The attorneys on the other hand object to the appellant raising any issue at all in this appeal apart from the question of costs. This is because the attorneys submit that on any proper reading of the transcript of the 21st November, 2019, the only matter at issue was the question of costs. In the attorneys' submission, the issue of the correct approach of the High Court to its decision-making function under s. 12 were not raised in the High Court. Moreover, they submit that there was effectively a decision not to contest the motion and to simply argue the costs of the application.

21. Counsel for the appellant rejects that construction of what occurred in the High Court. Counsel submits that the court had made it clear on earlier occasions that it was not interfering with the personal care decision of the attorneys and that the court was relying on the medical evidence before it. Counsel submits that regardless of whether s. 6 had been opened in full to the High Court, it was clear that the President of the High Court, as an experienced judge in this field was aware of the best interest provisions contained

therein. Counsel submits that the course the proceedings took on the 21st November reflected the proceedings already had in the case and were not a concession that her client accepted that her application had come to an end.

22. Having read through the attorneys' written submissions, there is agreement that the High Court had made a decision at an earlier stage that the donor was in an appropriate placement. The subsequent adjournments appear to have been for the purpose of allowing further input into the report of the medical visitor. In the circumstances, I am satisfied that it is appropriate for this court to proceed to determine the substantive issue in this case, namely, how the court should approach a review of a personal care decision.

The High Court Judgment

23. The then President of the High Court gave an *ex tempore* decision. In his usual fluent and articulate manner, he dealt with the law and the facts. In contrast to the brevity of the hearing, the judgment was detailed. He referred to the Act as being a new legislative provision. Previously, when a person lost capacity, it was necessary to apply to have them made a Ward of Court and the High Court would then make the decisions on their behalf. He referred to the ever increasing number of people who realised the sense in executing an EPA when they have mental capacity so that, in the event of them suffering from dementia or Alzheimer's Disease or brain injury or for any other reason they will have appointed persons whom they have freely chosen to make decisions relevant to their welfare.

24. The President referred to the decision made by the donor to execute an EPA at a time when he had mental capacity. He referred to him having executed it with the assistance of a solicitor and having satisfied a medical practitioner as to his competence. The President referred to the fact that the application to register was the subject of an objection which was not ultimately pursued. He said he hoped that that would have brought an end to the family dispute, which was fairly deep seated.

25. The President referred to the orders sought in respect of the provisions of s. 12(2) of the Act and to the relevant provisions of the Act. He noted he did not have any expertise in medicine, still less in geriatric medicine. He had suggested a sensible way of proceeding would be, if the parties were agreeable, to appoint one of the court's medical visitors available to him in the exercise of his wardship jurisdiction. He chose a consultant geriatrician to get involved. He said the medical visitor went far beyond what a medical visitor normally does. He had become involved with members of the family, had discussions with them, tried to broker a solution which would be agreeable to both sides and had produced three different reports to him.

26. He referred in detail to the medical visitor's report and recorded his views. He said that if he was to make the order sought that he would certainly like to have the support of the medical visitor's views on the basis that what he would be doing would be in the best interests of the donor. He said that on the other hand if the order that he was being asked to make would run counter to the medical visitor's views as to his best interests he said: -

"I would be very slow to do so because I would in effect be second guessing an independent expert who has had the opportunity of dealing with the members of the family, considering the paperwork that is being generated, has visited the unit, has visited the donor, has spoken to the geriatric team that is looking after him, and I would be in effect overruling his view, which I would be very slow to do."

27. The President then went through the reports in detail. He pointed out that the first report set out a synopsis of the donor's case which included the fact that he had severe advanced dementia and had a recent bereavement of his wife. He did not deal with the circumstances of the move to the nursing unit as that was a matter of dispute. He referred to the fact that one view was that it was done without any notice and in an insensitive way, while the other view was that it was done from the point of view of his wellbeing and welfare. He noted that he was concerned principally and almost exclusively with the best interests of the donor and not with any war or battle that may be conducted by members of the family. The President then went through the various physical conditions of the donor. In the course of the report it was recorded that it would be absolutely crucial that any family conflict be totally avoided in front of the donor; it would also have to be accepted that the nursing unit was the donor's new home. In those circumstances the medical visitor opposed visits to his previous family home as any short-term benefit would risk unsettling him.

28. The medical visitor reported that he accepted that all of the donor's children sincerely desired that their father would spend the rest of his days in his lifelong home. The medical visitor set out the huge financial resources that would be required to care for him at home, together with a very close working and united relationship between all family members as well as significant support from health professionals. In the medical visitor's view, going to live at home again was not a realistic option and he suggested that it should be now accepted by all family members that the nursing unit was his new home. He emphasised in his final sentence that it was crucial that family conflict be avoided. The President referred to the fact that that report had been circulated and that a second report was produced. In that report, the medical visitor again noted that the ideal option was to care for people in their own home, but he said that: -

> "The current family disharmony and the fact that the two groups are not on speaking terms obviously presents a major problem as both groups would have to be in full agreement with the discharge home. Both sides of the family would have to work together as a completely integrated team. Furthermore, if the situation at home were to fail, then it would be very difficult for the donor to get back in to the nursing home suite where he is at present as he would have to wait for a vacancy to arise."

The President then referred to the fact that the appellant had produced a care plan for the donor which was very detailed, very elaborate, with a whole series of plans set out in great detail. The President said that when that came to hand he asked the medical visitor if he would become involved again. He recorded that he had asked him to consider and

read submissions by the various parties and that has all been done and the professor had now reported to him.

29. The President again quoted from that final report and the medical visitor's conclusion that at present the donor was well cared for and unless the two sides of the family come together and fully agree a viable home plan between them he could not see how the *status quo*, while not optimal, as it is not the donor's home, could change.

30. In the determinative part of his judgment, the President noted that on a previous occasion he had pointed out that although the court had jurisdiction to make a direction of the type in question with regard to a personal care decision made by attorneys, that was a jurisdiction which had to be exercised very carefully. He said that he had to bear in mind that the donor when he made the EPA decided that the attorneys were the person whom he was choosing to make decisions on his behalf relevant to his welfare. He noted that they had made that decision.

31. He referred to the application by the appellant which was in effect to overturn the decision to put him into a nursing home. He pointed out that he had asked the professor to become involved on what was essentially an issue of medical and nursing care to be given to a very vulnerable and very elderly gentleman. The President stated that if he were to accede to this application he would in effect fly in the face of the recommendation made. He would be making decisions with life and death consequences for the donor to allow him to be moved back in circumstances where that was not advised by the medical visitor and where the level of help might not be as good as is hoped for and his wellbeing and his life would be in jeopardy. He said it would be remiss on the part of the court to simply ignore the views of the medical visitor. He said it would also be irresponsible of him to override the decision which had been made by the two persons chosen by the donor to make such decisions.

32. In a portion of his judgment which was the subject matter of considerable attention at the hearing of the appeal, the President stated as follows: -

> *"There is jurisdiction to do so but I would have to be satisfied that such a decision was an irresponsible one or an unlawful one or was so contrary to common sense that it couldn't be stood over or was so inimical to the life and welfare and health of [the donor] that it should be interfered with."*

33. The President held that the contrary was the position in this case. The decision had been made by persons chosen by the donor and the level of care which he was receiving was excellent and that was attested to by all three of the medical visitor's reports. The President stated that given the views expressed by the medical visitor, there was no basis upon which he could lawfully or legitimately give a personal care decision which ran counter to the decision made by the attorneys here. He said it would be wrong in principle for the court to make the order which is sought in circumstances where it would be in the teeth of the medical advice given to him by a person of such expertise and experience as the professor. He also pointed out that the appellant had not produced any

medical evidence to controvert the view expressed by the professor. He said that while it was true that a comprehensive and detailed nursing plan was produced, no doctor had been called in evidence to say that the professor was wrong or that the best interests of the donor would be served by moving him back home. In those circumstances he declined to make the order sought.

34. The President then went on to deal with the issue of costs. He rejected the view that there could be any basis upon which the appellant's costs could be paid out of the estate but also agreed with the respondents that there should be an order for costs in favour of the respondents as against the appellant. ¬¬

The Powers of Attorney Act, 1996

35. The long title of the Act states that it is "an Act to provide for powers of attorney to operate when the donor of the power is or is becoming mentally incapable and to amend in other respects the law relating to powers of attorney generally."

36. Section 5(1) of the Act provides:

> "[a] power of attorney is an enduring power within the meaning of this Act if the instrument creating the power contains a statement by the donor to the effect that the donor intends the power to be effective during any subsequent mental incapacity of the donor and complies with the provisions of this section and regulations made thereunder."

37. Section 6(1) of the Act provides that:

> "[a]n enduring power may confer general authority […] on the attorney to act on the donor's behalf in relation to all or a specified part of the property and affairs of the donor, or may confer on the attorney authority to do specified things on the donor's behalf and the authority may, in either case, be conferred subject to conditions and restrictions."

38. Section 6(6) states that:

> "[a]n enduring power may also confer authority on the attorney to make any specified personal care decision or decisions on the donor's behalf."

39. Under s. 4 of the Act, a personal care decision is defined as follows:

> "'personal care decision', in relation to a donor of an enduring power, means a decision on any one or more of the following matters:
>
> (a) where the donor should live,
> (b) with whom the donor should live,
> (c) whom the donor should see and not see,
> (d) what training or rehabilitation the donor should get,
> (e) the donor's diet and dress,
> (f) inspection of the donor's personal papers,

(g) housing, social welfare and other benefits for the donor;"

40. Of particular relevance to the case are the provisions of section 6(7) of the Act which provide:-

(a) "Any personal care decision made by an attorney on behalf of a donor shall be made in the donor's best interests.

(b) In deciding what is in a donor's best interests regard shall be had to the following:

i. so far as ascertainable, the past and present wishes and feelings of the donor and the factors which the donor would consider if he or she were able to do so;

ii. the need to permit and encourage the donor to participate, or to improve the donor's ability to participate, as fully as possible in any decision affecting the donor;

iii. so far as it is practicable and appropriate to consult any of the persons mentioned below, their views as to the donor's wishes and feelings and as to what would be in the donor's best interests:

I. any person named by the donor as someone to be consulted on those matters;

II. anyone (whether the donor's spouse or civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, a relative, friend or other person) engaged in caring for the donor or interested in the donor's welfare;

iv. whether the purpose for which any decision is required can be as effectively achieved in a manner less restrictive of the donor's freedom of action.

(c) In the case of any personal care decision made by an attorney it shall be a sufficient compliance with *paragraph (a)* if the attorney reasonably believes that what he or she decides is in the best interests of the donor."

41. The final provision of relevance under the Act is that contained in s. 12 and s. 12(2)(b)(iv). It is appropriate to set out the provisions of 12(1) and 12(2) in full however.

42. Section 12(1) provides: -

"[w]here an instrument has been registered the court shall, on application to it by the donor, the attorney or any other interested party, as the case may be, have the functions set out in subsections (2) to (6)."

43. Section 12(2) provides that: "the court may –

(a) determine any question as to the meaning or effect of the instrument;

(b) give directions with respect to—

i. the management or disposal by the attorney of the property and affairsof the donor;
ii. the rendering of accounts by the attorney and the production of the records kept by the attorney for that purpose;
iii. the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive, or the payment of additional, remuneration;
iv. a personal care decision made or to be made by the attorney;

(c) require the attorney to furnish information or produce documents or things in his or her possession as attorney;

(d) give any consent or authorisation to act which the attorney would have to obtain from a mentally capable donor;

(e) authorise the attorney to act for the attorney's own benefit or that of other persons than the donor otherwise than in accordance with *section 6(4)* and *(5)* (but subject to any conditions or restrictions contained in the instrument);

(f) where appropriate, relieve the attorney wholly or partly from any liability incurred or which may have been incurred on account of a breach of duty as attorney."

The Role of the Court under the Act

44. The appellant made extensive submissions centred on a statement that the loss of the donor's capacity to manage his affairs, which is the threshold for the registration of an EPA, does not result in any diminution of his personal rights under the Constitution. In the appellant's submission, the personal care decision under review, namely the placing of the donor in long term residential care, was a life altering one to which the donor himself did not consent. As this had profound consequences, it was a significant incursion into the donor's constitutional rights. The appellant relied upon case law concerning wards of court and in particular the withholding of medical treatment. The appellant submits however that these cases, namely in *Re Ward of Court (Withholding Medical Treatment) (No.2)* [1996] 2 I.R. 79 and *M.X. v. The Health Service Executive* [2012] 3 I.R. 254 established that the donor's wishes should have been considered and in that regard, the evidence had demonstrated that his wish to remain at home was unequivocal.

45. In the appellant's submission, any court asked to review a personal care decision made by an attorney must defend and vindicate the constitutional rights of the donor by firstly considering whether the decision was taken in accordance with the particular requirement of s. 6 to be in the donor's best interests. It was submitted that the High Court had moved away from those considerations. The role of the court was to do more than simply review the decision of the attorneys. The court had to conduct its own exercise in ascertaining what course of action was in the best interests of the donor.

46. Undoubtedly therefore, the core of this case concerns the jurisdiction of the High Court under s. 12(2)(b)(iv). Both sides rely on the decision of Baker J. in *A.A. v. F.F.* [2015]

IEHC 142 to advance their views. It was not every aspect of that judgment that was in dispute. The difference lay in the interpretation of certain *dicta* of Baker J. It is necessary to look in detail at that judgment.

The decision in A.A. v. F.F.

47. The factual background of *A.A. v. F.F.* is important in understanding the findings of the High Court. A general power of attorney covering both financial and personal care decisions had been granted to the second wife of the donor and their daughter. The donor's children from his first marriage applied to the High Court under s. 12 seeking directions to render accounts and produce records of various financial dealings. They also sought details of all personal care decisions taken by the attorney (at the time of registration only the daughter survived) in respect of the donor, as well as an order cancelling registration on the ground that the attorney was unsuitable.

48. In the course of the proceedings, the High Court was asked to determine the following issues:

    (1) whether and to what extend an attorney acting under a registered EPA was obliged to account to the High Court;

    (2) whether and to what extent an attorney acting under a registered EPA was obliged to account to other persons in a close family connection with the donor;

    and,

    (3) the role of the High Court in regard to a registered power of attorney and whether the High Court had a general or specific supervisory role in respect of the exercise of the function by an attorney, and how such supervisory role was to operate in practice.

49. In a careful and compelling judgment, Baker J. concluded that an attorney acting under a registered EPA was closer in characterisation and function to an agent rather than to a trustee. That was not contested in this case and I consider it an appropriate place to begin. For present purposes, I therefore adopt that reasoning of Baker J. in *A.A. v. F.F.*

50. Of particular relevance with respect to the present case is that portion of the judgment starting at para. 39 under the heading "Akin to Wardship". In the course of her judgment, Baker J. outlines the onerous obligations of the committee of a ward of court as an officer of the court. The committee of the ward is limited in the carrying out of its powers and duties to any directions given by the judge in wardship; the committee requires authorisation from the President of the High Court for the application of the monies of the ward or to sell the ward's property. Matters such as annual accounts *etc*. have to be provided to the High Court. She contrasts those obligations with the attorney acting under an EPA who requires no authorisation from the court. She concludes that the role of attorney acting under an EPA was not as a matter of law akin to the role of a committee acting in wardship. Importantly, she held *"[f]or the roles to be identical or broadly similar would be to ignore the fact that the legislature created in 1996 an*

alternative process by which the financial and other affairs of an incapable person could be dealt with".

51. Baker J. held that it cannot be inconsequential that the procedure for the appointment of an attorney provides for the nomination by the donor, at a time when his or her capacity was not in doubt, of the person or persons he or she chooses to act on his or her behalf. This was a finding that the attorneys in this appeal relied upon heavily.

52. Baker J. recognised that the statutory provisions under the Act were an important means by which the law recognises the autonomy of a person to choose an alternative or substitute decision maker should the donor become incapable. In that regard Baker J. held:-

> *"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."*

53. Following those observations, Baker J. held:-

> *"It is clearly intended that the attorney appointed under an enduring power would be a substitute, and that the role of the High Court was not to be merely another class of wardship jurisdiction, or arise from the jurisdiction in equity as exists over a trust. I reject the argument that the High Court has supervisory powers by analogy with those in wardship, and that the Court has inherent powers arising in equity or at common law. The role of the Court has a statutory origin."*

54. I agree with the reasoning of Baker J. and the conclusion she reaches as to the difference between the High Court's role in wardship proceedings and under the Act. There is no analogy with the wardship supervisory powers. The High Court's role is entirely a creature of statute.

55. Baker J. went on to discuss the supervisory power of the High Court under the Act. It is a feature of the judgment that her detailed examination concerned the supervisory powers as they applied to the financial affairs of the donor. Many of her comments however are of a more general nature. Baker J. commenced by stating that s. 12 of the Act confers a general supervisory power in the High Court with respect to registered powers. This power may be invoked by donor, attorney or any other interested party. There is no issue here but that the appellant is an interested party.

56. The appellant places particular reliance on the finding that "*[t]he High Court has various powers under s. 12 and those powers are wide and far reaching*". That statement must however be read in the context of the findings of Baker J. regarding the purpose or intent of the Oireachtas in giving the power under s. 12 to the High Court. Baker J. at para. 59 specifically referred to the whole purpose of requiring an attorney to keep accounts; this must be to enable the donor at any time to call for sight of those accounts and for an explanation as to the dealings on the account. She referred to the right of the donor therefore to ask the court to give directions, but noted that the donor of an EPA, 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. It was in that context Baker J. stated, in a passage relied upon by the appellant, as follows:

> *"One could say that the High Court takes the role as donor or principle 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."

57. Baker J. however went on to state that it did not seem that 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 the purposes of requiring an account. She held that the interested parties have *locus standi* in one context only and that is to make an application to the High Court. While she held that the jurisdiction of the court is broad and the court may give directions, the interested parties may not themselves require information, may not themselves require an account to be given 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 right to the court exercising its jurisdiction.

58. Baker J. then stated at para. 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."*

59. Baker J. referred to a decision of an English court in which the role of the Court of Protection under an equivalent section of the Enduring Powers of Attorney Act, 1985 was considered, *Re. C. (Power of Attorney)* [2000] 2 F.L.R. 1. She noted that this seemed to have been the only judicial authority either in Ireland or England on the extent of the court's supervisory role and the test that the court should apply. It must be noted that under the Enduring Powers of Attorney Act, 1985 in England and Wales, there is no power given to an attorney to make personal care decisions. It appears that that power was given later under the Mental Capacity Act 2005 in England and Wales. Of importance is that Jacob J. in the case of *Re. C.* was asked to determine whether a court ordered report should be provided to members of the family who were not the attorney. Jacob J. noted that there was nothing on the face of the report to suggest there is anything wrong with these transactions and he then stated: -

> *"Whilst, of course, one cannot say from the report that there is not behind the report something untoward, it is a pure matter of speculation whether there is or not. I can see no reason why the family should be allowed to indulge in that speculation to the distress of the patient*."

60. Having discussed differences between the English and Irish legislation as to the powers of the court on registration of an EPA, Baker J. stated: -

> *"[T]he Irish Legislation must be seen as a recognition by the Oireachtas of the desirability of giving a power of management and administration to a person of the donor's choice and accordingly the Oireachtas implicitly respects that choice."*

61. Baker J. went on to hold that there was a public interest in achieving a degree of transparency in the operation of an Enduring Power of Attorney. She held that the public had an interest to having available to it a statutory, easily understood and cost-effective means of respecting the interests and rights of persons who have become incapacitated, including an interest in respecting that person's wishes as expressed before the incapacity occurred. This was said in a context where Baker J. was of the view that if the duties of the attorney were so oppressive as to amount to a form of trust or to require expenditure, for example by engaging a forensic accountant or an auditor, then the legislation would fail to achieve the purpose for which it had been established. She noted that the legislation was broadly in the form recommended by the Law Reform Commission in its report in 1989. Its purpose was to avoid the day to day involvement of a court as is found in wardship and to avoid unnecessary and expensive wardship applications where the affairs of a person who has become incapable may fairly and properly be dealt with by a person that he or she trusted and entrusted with that role.

62. Baker J. then stated at para. 71: -

> *"I am conscious of the differing forces that exist between the supervisory role of the High Court which is contained in s. 12, the degree of scrutiny that the Court will exercise, and the object and intent of the legislation that the wishes and directions of the donor be respected, and that his or her chosen substitute or alternative*

decision making nominee be respected. These conflicting demands may properly be resolved in my view by interpreting the role of the Court as one to require explanation or to give directions only when it can be reasonably be said that a need has been shown to do this, or when the Court has a suspicion or has reason to enquire, and would not be a routine matter."

63. In her conclusions, Baker J. said it seemed to her that the Oireachtas intended the power of the court to be exercisable without limitation, but equally to place an onus on an applicant to show some reason why the matter comes before the court. At para. 72 she held:-

> *"An application under s. 12 would to that extent have to be focused in that it would either seek directions as to a certain matter or ask the Court to require that certain things be done. This would suggest that for the Court to enter upon an application some basis on which the Court's interference is warranted would need to be set out by the moving party. While the Court clearly has no general supervisory power under the statute, it seems to me that the Oireachtas intended the power of the Court to be constrained to some extent by a requirement that some cause be shown to it that would require its intervention, and although this does not seem to me to exactly import the test as outlined in Re. C, it does suggest that there must be at least stateable or arguable grounds for the Court to interfere, or impose requirements or seek information or clarification with regards to certain matters concerning the donor."*

64. At para. 73, she said that it seemed to her that certain matters might give rise to concern by the court sufficient to require it to intervene under section 12. The majority of these related to the financial affairs of a donor but at para. 73(f) she listed a change in residence other than one reasonably explicable by virtue of the physical or mental frailty of the donor.

65. As stated above, the appellant relied in particular on the statement 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. In my view that passage does not support the case made by the appellant that she, as an interested party, has the right to require the court to take that role. At para. 59 Baker J. was setting out the general position with regard to the High Court having the same degree of entitlement or control that a donor would have. The court expressly went on to draw a distinction with the role of interested parties.

Decision on the nature of the court's role under s. 12

66. The appellant places great emphasis on her submission that the correct approach is for the court to place itself in the position of the donor and to determine the best interests of the donor subjectively. The appellant submits that the High Court must put itself in the position of the donor when giving directions in respect of a personal care decision. In the appellant's submission, it was the donor's view that he wished to live in his house forever and that should have been the dominant focus of the court in the giving of directions.

67. In my view, such an approach does not accord with the legislative intent as set out in the provisions of the Act. Baker J. correctly identified the intent of the legislature in providing for a procedure which permits a donor to determine in advance who should make decisions in their best interest should they become incapacitated. If the appellant's argument is correct, it would mean that in every case where an interested party disagreed with the decision of an attorney, the High Court would have to make all those decisions itself merely on the issuing of a notice of motion by that interested party seeking directions. In my view, that proposition is not correct as it does not take into account the architecture of the legislation, the statutory intent behind this creation of an entirely new procedure, and importantly, the clear wording of the Act and in particular, s. 6 thereof.

68. The Act expressly provides for formal execution of the EPA involving both a solicitor and a medical practitioner, each with specific duties. This ensures that those persons who are mentally capable, enter into this procedure with full knowledge and consent to the appointment of attorneys with very specific powers should they become incapable. More specifically, s. 6(6) permits such an EPA to confer authority on the attorney to make any specified personal care decision or decisions on the donor's behalf. It is a specific authority that may or may not be granted to an attorney in the EPA; the donor opted to do so in this case. Section 6(7)(a) requires that the personal care decisions made by attorneys are to be made in the donor's best interests. Section 6(7)(b) provides that regard has to be had to certain matters. Of further significance but not of itself determinative, is s. 6(7)(c) which provides expressly that "it shall be of sufficient compliance with *paragraph (a)* if the attorney reasonably believes that what he or she decides is in the best interests of the donor."

69. The appellant submitted that s. 6(7)(c) only applies as a defence to an action taken against an attorney. In my view however, the subsection has a greater ambit than that. On the face of the subsection there is no such limitation. There is also nothing in the Act that would indicate such a restriction. In its ordinary and natural meaning therefore, I consider that it applies to all challenges to a decision of an attorney in respect of personal care decisions. That, in my view, is the only rational interpretation of that subsection and one which accords with the analysis of the purposes of the Act as set out by Baker J. above.

70. An application for a direction under s. 12 in respect of personal care decisions when brought by a donor or by an interested party, is a challenge to a decision by an attorney. Even if framed as one which is simply requiring the court to act in the best interests of the donor in accordance with what it is believed the donor subjectively would have preferred, it nonetheless is a challenge to the attorney's decision which has already been taken. To insist that s. 6(7)(c) has no role to play in the exercise of the court's jurisdiction under s. 12, would fly in the face of the provisions of the Act. The Act expressly gives to the donor the power to decide who should make those decisions in his or her best interests and provides that the attorney's decisions made upon reasonable belief amount to compliance with the Act.

71. The finding that the court does not make the decision anew but that the court has to conduct its own supervisory jurisdiction by recognising the ambit of s. 6(7)(c) does not conclude matters. Critical to that jurisdiction is the nature and standard of that review given the specific wording of the subsection.

Decision on the standard of the review

72. Counsel for the appellant as part of her overall submissions argued that the standard of review adopted by the President in this case was incorrect and far too onerous. Her submission was directed towards establishing the *de novo* power of the court to ascertain the best interest of the donor and to give directions accordingly. I have rejected that approach and now must turn to the standard of the review. For that I have found the submissions of counsel for the attorneys helpful. She submitted that the standard of review was partially subjective and partially objective. In her submission, the starting point was that the attorneys subjectively had to be of the belief that they were reasonably deciding in the best interests of the donor. Counsel for the attorneys accepted that where review was required by the court, the court had the power to review the reasonableness of that decision.

73. Counsel for the attorneys submitted however that the decision of Baker J. should be followed insofar as there had to be triggering evidence before the court would even begin to engage in a question of assessing the reasonableness of the attorney's decision. In other words, no attorney should have to provide any response to an application for a direction in the absence of the court having cause to conduct such an assessment. In my view given the findings I have made above, that is undoubtedly the correct approach to take. If it were otherwise, each decision of an attorney could thereafter become the subject matter of an enquiry by a court without any objective evidence whatsoever being placed before the court to warrant engaging its supervisory functions. Not only would this undermine the purpose of the Act in establishing this new procedure separate from wardship, it would have the consequence of placing unduly onerous obligations on an attorney. An attorney would be required to come before the High Court and explain each and every decision when a donor or interested party brought an application under section 12. An attorney would be required to make positive assertions in each challenge if there was no triggering filter which would require the Court to enter into an inquiry under s. 12 of the Act. Thus, even if s. 6(7)(c) was to be relied upon by an attorney, the absence of a filter or triggering requirement, would require attorneys to assert on affidavit that they had acted with the reasonable belief that they were acting in the best interests of the donor. Every time an attorney is required to respond to a s. 12 application for directions, there is the potential to deplete the funds of a donor, or, in the absence of means of a donor, to place at least a moral duty on attorneys to defend such a contested decision through the use of their own financial means. That would be the very opposite of respecting the autonomy of a donor to choose an attorney in the expectation that the attorney would take decisions in their best interests without fear of unnecessary court scrutiny of any reasonable decision that was made. I am therefore satisfied that it is appropriate and necessary for a person challenging an attorney's decision under s. 12 to provide some evidence that would justify the beginning of an inquiry.

74. If the High Court is satisfied that it is appropriate to begin an inquiry based upon the evidence of the interested party, the High Court must only give directions as to a personal care decision having taken cognisance of the provisions of s. 6(7)(c) of the Act of 1996. In assessing the reasonableness of the attorney's decision, the High Court must bear in mind that the Act has given to the attorney the power to make those decisions in a manner akin to an agent of the donor and therefore the court is not approaching its task from the perspective of its jurisdiction under wardship proceedings. It is therefore not a question of whether the court would have made a different decision but whether the attorney's decision was in all of the circumstances a reasonable one.

75. In one sense, the appellant's case is encapsulated by the submission that this could not have been a reasonable decision because of the failure to have regard to the donor's clear and uncontested wish to remain in the family home, and in particular, the failure to allow the donor to participate in the decision as to where he should live. That latter submission was made in the context of the manner in which the donor was removed from the home (the lack of consultation with him and indeed the interested party) and also the failure to allow him to participate in a meeting in the nursing home between both parties and relevant staff and representatives of other agencies.

76. At this point it is appropriate to comment on the requirement in the statutory provision that in deciding what is in a donor's best interest "regard shall be had" to the factors set out in s. 6(7)(b) of the Act. The phrase "have regard to" has been a feature of planning legislation for some time and the courts have distinguished it from the requirement of planning authorities "to comply" with certain criteria. As Clarke J. stated in *Tristor v. Minister for Environment, Heritage and Local Government and Others* [2010] IEHC 397 (at para. 7.11)

> "*Likewise, Quirke J. in McEvoy v. Meath County Council [2003] 1 I.R. 208, noted, in relation to an obligation to 'have regard' to matters, that the local authority concerned was not 'bound to comply with the Guidelines and may depart from them for bona fide reasons consistent with the proper planning and development of the areas for which they have planning responsibility'. I adopt the view of Quirke J. as being applicable to this case.*"

77. The factors contained in s. 6(7)(b) are therefore not obligatory factors with which attorneys must comply. So long as the decision to depart from them is reasonably made (which would include being made *bona fide*) in the best interests of the donor, the court should not interfere with the decision. In my view that is a crucial issue that those who seek to challenge an attorney's personal care decision must understand; the requirement is to have regard to the factors but is one which allows a departure from them which is reasonably made in the best interests of the donor.

Assessing the reasonableness of the attorney's decision

78. Section 12(2) permits the High Court to give directions with regard to an attorney's personal care decision. Section 6(7) refers to reasonable belief of the attorney. As it is the decision that is under review, I am of the view that the focus must remain on the

decision. It is for that reason I will refer to the reasonableness of the decision as distinct from the reasonableness of the belief.

79. What must be demonstrated is that the decision is objectively unreasonable. The concept of objectively unreasonable is most often found in administrative law. This situation is not one of public law. In my view however, although this is a private law obligation on an attorney *vis á vis* their commitment under the EPA, it more properly fits in to an assessment conducted by analogy to the approach adopted in considering public law unreasonableness. I base this upon the fact that although the attorney's decision would not be subject to judicial review, it is in its widest sense (as set out above) subject to being reviewed judicially (as per s. 12). The limited nature of the review comes from the specific provision in the Act giving the power to the attorney to make the decisions in the best interests of the donor. These are personal decisions where the attorney is standing in for the donor in exactly the type of everyday decisions that a capable person would be expected to make for themselves. The court under s. 12 must respect the primacy of the attorney's right to make the decisions in the best interests of the donor.

80. How then to assess the reasonableness of the decision? Of crucial importance is that the High Court is engaged in a review of the decision and not an appeal against the decision. Deference to the decision maker's right, in accordance with the donor's decision to grant the power to the attorney, to make these personal care decisions, is fundamental to how the High Court engages with the review.

81. Although the decision does not have a public law element, in a case where the initial hurdle of adducing some evidence to suggest that *prima facie* at least, the decision under challenge is not objectively reasonable has been surmounted, some of the factors relevant to the review of decisions in public law, such as *mala fides* or acting for an improper purpose may, if established by objective evidence rather than mere assertion, by analogy, be relevant to the consideration of the court conducting the review. I consider that the reference by the President of the High Court to the decision being irresponsible or unlawful, or so inimical to the life and welfare and health of the donor that it should be interfered with, encapsulates the type of circumstances where the High Court should intervene in a personal care decision. Clearly, if an attorney makes a care decision that is outside the ambit of a personal care decision as defined in the Act that is subject to review under s. 12 of the Act. Similarly, if the personal care decision was made for an improper purpose *e.g.* for the purpose of punishing the donor or another party for some perceived offence, this would be subject to intervention by the High Court under s. 12 of the Act. Decisions made in those circumstances could not be said to be objectively reasonable and would justify the Court in giving directions under s. 12 of the Act.

82. The standard used to assess whether the belief of the attorney leading to the impugned decision, although subjectively reasonable, was in fact objectively reasonable is whether the decision is fundamentally at variance with reason and common sense. In the context of a decision of an attorney under the EPA, the review by the court can be formulated as

follows: the decision must be manifestly not in the donor's best interests and so irrational that no attorney, acting reasonably in accordance with those interests, could have arrived at it. The precise application of that test will, of course, depend on the precise circumstances in which it falls to be addressed. However, the burden of meeting it is substantial, and will not be met by claiming that it is wrong, or that others might acting reasonably have reached a different decision or for that matter that the decision is not one that the donor himself or herself would have reached. If the decision is not unreasonable in that sense, the court must not intervene and give directions based upon its own view of what other course might be reasonable.

83. Although as I have said, the attorney is not necessarily a skilled person in a professional sense, the attorney is the person chosen by the donor to make these decisions where the donor is him or herself incapable of making those decisions. That is why the court must be slow to intervene in this area of personal autonomy. Nonetheless, it is clear that any effect on the rights of the donor should be within constitutional limitations. The appellant's concern about any diminution of personal rights under the Constitution is met by the standard of the review. The attorneys must respect constitutional rights. The appellant must recognise that the Act has inbuilt mechanisms with respect to the autonomy of a donor. At the point where an attorney makes personal care decisions, it has to be recognised that the donor lacks capacity so references to decisions being made "without the consent of the donor" have limited relevance to the decision-making process. No doubt while many or most people would prefer to remain in their own home until the end of life, circumstances may force that preference to cede to a new imperative. Where such a person becomes incapable of managing their own affairs, it is for the attorney to make the decision in the best interests of the donor, having regard, *inter alia*, to the donor's previous wishes. That the decision contradicts previously expressed views does not of itself diminish constitutional rights. The donor, it must be remembered, has exercised his or her constitutional right of autonomy by voluntarily entrusting to persons in whom he or she has confidence, the power to make decisions affecting his or her welfare. To give effect to the expressed wishes of the donor at a time when he or she has been determined incapable of managing his or her own affairs so as to over-ride a judgment of the appointed attorneys that meets the test of reasonableness as I have formulated it, is to negate rather than implement the donor's wish. Similarly, a decision by an attorney that it is in a donor's best interest to reside in a specialist nursing home suited to their dementia needs does not of itself represent an incursion into the donor's constitutional rights. If anything, these decisions, where reasonable, are the giving of effect to constitutional rights and protections.

84. The matters set out in s. 6(7) are those to which the attorney shall have regard. The matters set out therein are not individually determinative of a given outcome. A reasonable attorney will have regard to them, but they cannot individually or even cumulatively outweigh what may be an overall assessment of the best interests of the donor. For example, the past and present wishes and feelings of the donor to remain at home and the factors the donor would consider if he or she were able to do so would, if given primacy, lead to a situation where a mentally incapable person would be left to live

in a dangerous and unsafe situation which would in fact be inimical to their rights. The need to permit and encourage participation must factor into account the extent of the lack of mental capacity and the regard that must be had to those caring for the donor or those interested in his welfare is only required insofar as practicable and appropriate.

The approach the High Court should take to s.12 applications regarding personal care decisions

85. In light of the foregoing, I would propose the following approach of the High Court to any application by a donor or an interested party for a direction regarding a personal care decision taken by an attorney:

a) The role of the court is limited by the grant of authority under the Act to the attorney to make personal care decisions in the best interests of the donor.

b) The role of the court is to review the attorney's decision. In reviewing the decision, the court does not make a decision *de novo*. It is not a role akin to the court's supervisory decision in wardship.

c) Although the role of attorney is not one requiring specialist knowledge or skill, it is a decision concerning personal autonomy that the legislature has permitted a donor to place in the hands of a person chosen by him or her.

d) As a corollary of the primacy of the attorney's role, before the court can commence a review of a decision of an attorney, the court must have some evidence to suggest that *prima facie*, at least, the decision under challenge is not objectively reasonable.

e) The court's role is also limited by the provision in s. 6(7)(c) that it is sufficient compliance with the duty to act in the best interests of the donor if the attorney reasonably believes that what he or she decides is in the best interests of the donor.

f) There is a subjective and objective element to the reasonableness of the attorney's decision. An attorney must subjectively believe that they have acted reasonably in the best interests of the donor. That belief must also be objectively reasonable.

g) A decision made *mala fides* or for an improper purpose could neither be subjectively nor objectively reasonable. However, it should be stressed that before such a case could be entertained by the Court (a) the Court would require some evidence to suggest that *prima facie*, at least, the decision under challenge is not objectively reasonable and (b) a case based upon *mala fides* or improper purpose must be supported by evidence and not assertion.

h) The decision will be objectively unreasonable if it is one that is fundamentally at variance with reason or common sense. This means that the court will only review the decision where it is manifestly not in the donor's best interests and so irrational that no attorney, acting reasonably, could have arrived at it.

i) The personal care decision is one which affects rights and therefore it must be made within constitutional limitations. The donor has exercised autonomy in giving the power of attorney to another to make personal care decisions. Those personal care decisions relate to the exercise of commonplace and everyday decisions such as where to live and who to see; the giving effect to the grant to the attorney of those powers by the donor when he or she had capacity to do so reflects a respect for the donor's constitutional right to autonomy. A review based upon a breach of constitutional rights of the donor will only be sustainable where the result of the attorney's decision is that the donor's fundamental constitutional rights are not being respected. Such a situation might arise where the decision as to where the donor is to live has meant that the donor is living in inhuman and degrading conditions.

Assessing the High Court's Decision

86. I am satisfied that the President of the High Court carried out his review of the attorneys' decision in a manner appropriate with the role of the High Court under section 12. His standard of review took into account the primacy of the attorneys' decision. The standard he applied accorded with the nature of the review required of the court. He did not misdirect himself in law. Moreover, there was adequate evidence before him to justify the decision that he made.

87. A separate and insurmountable hurdle for the appellant in this appeal, is that by the time the High Court came to make its final decision, the court had evidence in the form of three successive reports from the medical visitor. A considerable period of time had passed since the motion had first issued. The motion itself had simply sought the court's directions in accordance with section 12. The final paragraph of the grounding affidavit made clear that the appellant was asking the court to

> "review the decision to place my father in a nursing home and to direct that he be returned to his home. In the alternative I would ask the court to direct that the services of a Geriatrician be employed to assess what is in my father's best interests."

A court that found a personal care decision of an attorney to be unreasonable, could only give a direction as to the best interests of the donor on the basis of the best interests of the donor at the time the court was to give its direction. There would have to be up to date evidence as to what was in the current best interests of the donor. The only up to date evidence before the High Court was that it was in the best interests of this donor to remain in the nursing home where he was.

88. The involvement of the medical visitor had been agreed by the applicant herein and he came to the conclusion that it was indeed in the best interests of the donor to remain where he was. He was very alive to the fact that the wishes of the donor had always been, prior to his incapacity, that he was to remain in his own home. The medical visitor also spoke with the donor and it was clear that he was participating in the process by which his best interests were to be assessed. While that may have been his medical

opinion, in the situation where the donor had severe advanced dementia and required significant levels of care, it amounted to the only independent evidence on what was in the best interests of the donor; the appellant's care plan and views on home care being nothing more than her assertion of what was in the donor's best interest.

89. Therefore, in this case, there was simply no evidence to suggest that at the time the High Court President came to make his decision, that it was anything other than in the best interests of this donor to remain where he was. Regardless therefore, of whatever standard of review was placed upon the original decision of the attorneys by the High Court, this appeal must fail as there is no basis for this Court to interfere with the decision of the High Court that the nursing home placement was in the best interests of the donor.

90. Indeed, I would go further and note that there was insufficient evidence placed before the court in challenging the initial decision of the attorneys that a nursing home placement had been in the donor's best interests. The appellant put forward her own subjective view as to what was in his best interests but did not address the issue in a manner which would have justified the intervention of the court. Instead, the appellant's focus had been on asking the High Court to give a direction rather than focussing on the necessity to prove that the decision of the attorneys required review, prior to any direction being given. That much is apparent from the what the appellant sought in the affidavit; general directions and the return of her father to his home together with the alternative request for a geriatrician to be employed to assess what was in her father's best interest.

Conclusion

91. As can be seen from the foregoing, the approach of the President of the High Court was in its essence, correct. He took the view that he was reviewing the decision in terms of its unreasonableness or its illegality together with a regard to the fundamental rights of the applicant to life and bodily integrity. For the assistance of the High Court in future applications under s. 12 by donors or interested parties, the principles to be applied by the High Court in exercising its jurisdiction under s. 12 regarding personal care decisions have been set out above.

92. Moreover, in the present case, at the time of the taking of the decision by the attorney and by the time of the decision of the High Court, the evidence clearly supported the proposition that the decision was reasonable and was made in the best interests of the donor. There was no evidence to support the contention that the decision was unreasonable in any of the senses set out above. Indeed, there was no independent evidence to support the subjective view of the appellant that the decision to remove the donor from his home to reside in a nursing home was not in his best interests. At the time of the decision of the President of the High Court, the evidence supported the view that it was in the donor's best interest to remain in the nursing home.

93. For all of the reasons set out in this judgment, I would dismiss this appeal.

94. As the attorneys have been entirely successful in this appeal, I would propose to make an order for the payment of their costs by the appellant herein. That order will not be made

on receipt of short submissions (maximum 2,000 words) from the appellant as to why the usual rule should not be followed within 14 days of the electronic dissemination of this judgment. The attorneys will have a further 14 days to reply to those submissions if they wish to oppose the submissions. The Court would consider those submissions and give a reasoned decision in due course.

95. As this judgment is being delivered electronically, it is appropriate to record the agreement of the other members of the Court.

Noonan J.: I agree with this judgment and the proposed orders.

Murray J.: I agree with this judgment and the proposed orders.