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LAW AND THE ELDERLY: A CASE FOR REFORM

FRIDAY 16 MAY 2003

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The Law and the Elderly: A case for reform

INTRODUCTION:

This paper arises out of a more detailed study that The Law Reform Commission is engaged in on the topic 'The Law and the Elderly.' This paper simply deals with a few net issues and does not attempt in any way to be comprehensive. The selection of the issues has been dictated by recent case law in the area of Undue Influence and from practical questions that have arisen in relation to Enduring Powers of Attorney and Joint Bank Accounts.

PART ONE: UNDUE INFLUENCE

1.01 A number of cases have recently come before both the English and Irish courts which examined the question of undue influence and both jurisdictions have reiterated the distinction between actual undue influence and presumed undue influence.

1.02 The equitable doctrine of undue influence allows a court to declare invalid any transfer of property from a vulnerable person where a dominant party has used the dominant position to bring about the transaction.

1.03 In the light of many practical situations such as gifts of assets to children or parents entering into what are now commonly known as 'equity release schemes' what are the issues that lawyers and financial institutions should have regard to.

1.04 First, a brief look at the distinction between actual undue influence and presumed undue influence:

Actual:

> "**A**ctual undue influence…is an equitable wrong committed by a dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. …Actual undue influence does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such a relationship."[1]

[1] Lord Hobhouse of Woodborough - *Royal Bank of Scotland v Etridge (No2)* [2001] 4AER 449,481.

Presumed Undue Influence:

> "Presumed undue influence is different in that it necessarily involves some legally recognised relationship between two parties. As a result of that relationship one party is treated as owing a special duty to deal fairly with the other. …Such legal relationships can be described as relationships where one party is legally presumed to repose trust and confidence in the other – the other side of the coin to the duty not to abuse that confidence."

Lord Nicholls of Birkenhead in *Etridge* stated that:[2]

> "[T]he types of relationship are infinitely various…the principle is not confined to cases of abuse of trust and confidence. It also includes cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other…."[3]

He also stated that it was essential that:

> "The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests and the latter betrays this trust by preferring his own interests…. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things…the issue is likely to arise only when…the transaction was disadvantageous either from the outset or as matters turned out."

1.05 Whether a transaction has been brought about by undue influence is a question of fact. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. However with presumed undue influence the relationship itself and the circumstances of the transaction will give rise to the presumption.

1.06 In *Barclays Bank v O'Brien*[4] Lord Browne-Wilkinson stated that it was not necessary to prove that any coercion has occurred, or to establish any moral blameworthiness on the part of the defendant. The existence of the relationship between them is deemed sufficient to establish that the plaintiff could not have brought an independent mind to bear, so as to consent freely to the transaction.

1.07 In the *Royal Bank of Scotland v Etridge*[5] Lord Nicholls stated that:

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2 *Royal Bank of Scotland v Etridge (No2)* [2001] 4AER 449,481.

3 *Royal Bank of Scotland v Etridge (No2) [2001] 4AER 449,481.*

4 [1994] AC 180

5 (No 2) [2001] 4AER 449.

> "[t]he law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected"

He went on to say that in such cases the law presumes irrebuttably that one party had influence over the other.

1.08 Ms Justice Susan Denham in *Carroll v Carroll*[6] stated that:

> "[t]he reason for the equitable law to protect Thomas Carroll Snr is one of public policy – to protect a frail person" quoting from Allcard v Skinner[7] "…the Court interferes not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

The public policy grounds were also approved by Ward LJ in another case of undue influence where an elderly person was involved.[8]

1.09 In a number of these cases there were similar features which the courts regarded as critical to the issue of establishing undue influence. These issues are also very relevant in today's climate where advisors are being called upon to advise in transactions where the real purpose is to benefit another person.

A Future Needs/Improvident bargain

1.10 In advising an elderly person as to whether to gift assets to another (particularly children where the presumption of undue influence automatically arises) regard must be had to the future needs of the elderly person.

1.11 In *Carroll v Carroll*[9] a factor that influenced the court was the fact that the transaction in question was an improvident one and should be set aside on this basis. Both the High and the Supreme Court found that the solicitor in question made no inquiries of Thomas Carroll Snr as to whether he had any other assets apart from the premises the subject of the transfer and that the advice given did not take into account all the relevant circumstances including his relationship with his daughters. In the High Court Shanley J said:

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6 [1999] 4 IR.

7 (1887) ChD 145.

8 *Hammond v Osborn and another* [2002] EWCA Civ 885.

9 [1999] 4 IR 241.

> "I am not satisfied that any real consideration was given to the fact that the donor (a frail man, in dependant circumstances) was disposing of all his real assets without reserving to himself (by way of a revocation clause or by way of charging the property with his maintenance and support) any protection for his own future particularly in the event of a falling out with his son or in the event of his son predeceasing him."[10]

1.12 In *Donal O'Siodhachain and Patricia Herron v Sean O'Mahony and Geraldine O'Mahony*[11] Kearns J stated that he was satisfied that the agreement was

> "an extremely improvident one…it is difficult to imagine a more catastrophic outcome from the defendants' point of view where in the event that a lease might be regarded as valid giving a 15 year rent free occupation to the plaintiff."

1.13 In *Hammond v Osborn and another*[12] Sir Martin Nourse stated that the elderly Mr Pritler was not told the effect of the transfer of a sum of almost GB£300,00 to Mrs Osborn which was that he was left with cash of approximately GB£30,000.

> "No consideration was given as to whether those assets would be sufficient to satisfy his future needs. Nor was any consideration given to the extremely serious fiscal consequences of the realisation of his investments"

1.14 In that case the defendant argued that Mr Pritler had an ongoing teacher's pension but LJ Ward stated that *"the demands which might be made upon that limited income and the demands include affording care in the future"* should be borne in mind. He also stated that available resources should have been balanced against likely needs and obligations.

1.15 In another case where the court found that the transaction in question was manifestly disadvantageous to the donor in that she gave her house away and in the circumstances it was highly imprudent to do so. [13]

1.16 The courts have clearly indicated that a transaction will be set aside on the basis that it was an improvident one from the point of view of an elderly person.

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10 *Carroll v Carroll* [1998] 2 ILRM 218.

11 HC 31/10/2002.

12 [2002] EWCA Civ 885.

13 In *the Estate of Lily Lousia Morris deceased* [2001] WTLR 1137.

B Capacity

1.17 An issue that has been argued in many of the cases in relation to presumed undue influence is that the donor in question had capacity to understand what they were doing. But the courts have found the fact that the donor had capacity is not a defence.

1.18 One of the grounds for appeal to the Supreme Court in *Carroll v Carroll*[14] was *"the clarity and independence of mind"* of Thomas Carroll Snr at the time of executing the deed of transfer. Ms Justice Denham stated that:

> "This case is not about the presence or absence of mental capacity. The onus is on the defendant to produce evidence to discharge the presumption of undue influence."

1.19 In the High Court Shanley J confirmed that he accepted that Thomas Carroll Snr was mentally alert at the date of the transfer but stated that

> "I am not at all happy that at the date of the transfer he had the necessary independent advice (whether it was that of a legal advisor or a competent or a competent and qualified lay person) such as would persuade me that the transaction was made of his own free will."[15]

1.20 In *Hammond v Osborn and another*[16] the Court agreed that Mr Pritler knew that he was making a gift to Mrs Osborn and must have know that it was substantial gift but he was not told the size even in approximate terms so he did not know the nature of the gift. It was therefore impossible to say that the gift *"was made…only after full, free and informed thought about it."* The Court therefore found that once the presumption is raised and unless and until it is rebutted it is presumed that the donee preferred his own interests and had not behaved fairly to the donor. In *Moyles v Mahon*[17] the presumption of was raised but was rebutted.

1.21 In *Meredith v Lackschewitz-Martin and another*[18] the question of capacity arose again. A psychiatrist's report stated that while "Lelia" appreciated some help with managing her day to day household accounts she did not lack capacity to exercise decisions in these areas herself. In fact "Lelia" was a very strong willed 92-year-old. The Court held that she did not lack legal capacity but she had had a number of medical set backs in the year in question which must have diminished her energy and her ability to impose her will.

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14 [1999] 4 IR 241.

15 [1998] 2 ILRM 218,231.

16 [2002] EWCA Civ 885.

17 HC 6 October 2000

18 [2002] EWHC 1462.

- She was in very close contact with her children and increasingly subject to their influence.
- The transaction as a whole was not sufficiently explained to her before she signed.
- She did not have a proper opportunity to think matter over.
- The disadvantages were not explained to her.
- She received inadequate legal advice, nothing that could be fairly described as independent.

The Court stated that its picture of a lady, once fully on top of things but no longer able through frailty and competing calls of affection to give effect to her real wishes. It held that "Lelia" was thus susceptible to the influence of her children in whom she placed trust and confidence and thus the transaction in question was procured by undue influence.

1.22 Apart from elderly donors in *O'Siodhachain*[19] Kearns J found that the defendants (the first named defendant had limited educational achievements and was a person of considerable immaturity but that the plaintiffs *"were an experienced duo"* that the second plaintiff:

> "as both her personal and academic history and indeed her conduct of this case shows, is a woman with only considerable experience of the law, but also is possessed of sharp mental skills and significant experience in contesting problems over a wide spectrum of issues.") were under the influence of the plaintiffs, "a situation that was compounded by the severe financial pressure which they found themselves."

C Solicitor's Duty

1.23 The courts also reviewed a solicitor's duty in cases of undue influence. Is a solicitor's duty merely to take instructions or does he/she also have a duty to explain the documentation without being concerned further?

In the Supreme Court Barron J in *Carroll v Carroll*[20] in accepting the principles laid down in *Powell v Powell*[21] stated:

- A solicitor who acts for both parties cannot be independent of the donee in fact and
- To satisfy a court that the donor was acting independently of any influence from the donee and with full appreciation of what he was doing is should be established that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person.
- Further the advice must be given with the knowledge of all relevant circumstances and must be such, as a competent advisor would give if acting solely in the interests of the donor.

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19 In *the Estate of Lily Louisa Morris deceased* HC 31/10/2002.

20 [1999] 4 AER 241.

21 [1900] 1 Ch 243.

1.24 In the event in *Carroll*[22] Barron J pointed out that the solicitor in question:

- Did not have the knowledge of all the relevant circumstances and
- He did not give advice; he merely set out to carry out the donor's instructions.

1.25 Mr J Barron went on to state that even if the solicitor in question had been the donor's solicitor the transaction would not have been saved:

> "a solicitor or other professional person does not fulfil his obligation to his client…by simply doing what he is instructed to do. He owes such person a duty to exercise his professional skill and judgement and he does not fulfil that duty blithely following instructions without stopping to consider whether to do so is appropriate. Having done so, he must then give advice as to whether or not what is required of him is appropriate."[23]

1.26 The duties of a solicitor in such circumstances were set out in detail in the Court of Appeal in the *Royal Bank of Scotland plc v Etridge*:[24]

> "A solicitor who is instructed to advise a person who may be subject to the undue influence of another must bear in mind that it is not sufficient that she understands the nature and effect of the transaction if she is so affected by the influence of the other that she cannot make an independent decision of her own. It is not sufficient to explain the documentation and ensure she understands the nature of the transaction and wishes to carry it out. …His duty is to satisfy himself that his client is free from improper influence and the first step must be to ascertain whether it is one into which she could sensibly be advised to enter if free from such influence. If he is not so satisfied, it is his duty to advise her not to enter into it, and to refuse to act further for her in the implementation of the transaction if she persists."

1.27 I am aware that in the House of Lords in *Etridge*[25] Lord Nicholls of Birkenhead stated that this formulation of a solicitor's duties went too far when considering cases where wives guarantee the indebtedness of their husbands and then claimed to be under the influence of their husbands but he did state that there may be exceptional circumstances where a solicitor should refuse to act. He also stated that as a core minimum the advice that a solicitor can be expected to give should cover the following matters:

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22 [1999] 4 AER 241.

23 [1999] 4 AER 241,266.

24 (No 2) [1998] 4 AER.

25 (No 2) [2001] 4 AER 449.

- The nature of the documentation needs to be explained and the practical effects of them if signed.
- The seriousness of the risks involved, including a discussion of the nature of the property involved.
- To state clearly that the potential donor has a choice.
- To ascertain the precise wishes of the potential donor.

1.28 On the question of refusing to act, the very fact that Terence Casey Solicitor refused to act further for the O'Mahonys in the *O'Siodhachain* case[26] if they went ahead with the [third] contract against his advice eventually brought the O'Mahonys to their senses.

1.29 Clearly the onus on solicitors in such circumstances in onerous. If a solicitor is not satisfied that his/her client is free from improper influence then it is the solicitor's duty to advise the client not to enter into the transaction or to refuse to act further for the client. Farwell J in *Powell v Powell*[27] also stated that it was the duty of a solicitor *"to protect the donor against himself and not merely against the personal influence of the donee."*

1.30 At a bare minimum, a solicitor who has received instructions where he/she is of the view that the client should not enter into the proposed transaction, should set out clearly in writing to the client the reasons for the advice and what action or inaction the solicitor believes to be in the best interest of the client. In *Gregg v Kidd*[28] Budd J pointed out that a solicitor "should appraise himself of the surrounding circumstances in so far as he reasonably can; if he does not do this he can never put himself in a position to advise his client fully and effectively."

D Financial Institutions

1.31 Having briefly looked at the position of professional advisors, what if any obligations have financial institutions to elderly or vulnerable persons who enter into guarantees on behalf of or release equity in their homes for the benefit of persons who may be in a position to exercise influence and where the transaction is clearly not to the advantage of the elderly or vulnerable persons? Further what is the position with regard to the future needs of the elderly person when they are charging the main asset that will be required for future care and maintenance?

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[26] *Donal O'Siodhachain and Patricia Herron v Sean O'Mahony and Geraldine O'Mahony* HC 31/10/2002.

[27] [1900] 1 Ch 243.

[28] [1956] IR 183

1.32 The House of Lords in *Etridge* [29]looked in detail at the position of banks and whether they need concern themselves in cases of undue influence with relationships where there was a sexual relationship (*ie* husband and wife cases) or need they concern themselves with any other type of relationship. The Court decided that the only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between surety and debtor if non commercial. Lord Nicholls stated that the bank must always take reasonable steps to bring home to the individual guarantor/debtor the risk of acting surety. He stated that in all conscience, it is a modern burden for banks and for lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual.

> "If a bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor…[T]he equitable concept of being 'put on inquiry' is the parent of a principle of general application, a principle which imposes no more than a modest obligation on banks and other creditors. The existence of this obligation in all non commercial cases does not go beyond the reasonable requirement of the present times. In future, banks and other creditors should regulate their affairs accordingly."

1.33 Given the authority of the House of Lords it is also assumed that the Irish cases of *Bank of Nova Scotia v Hogan*[30] and *Ulster Bank Limited v FitzGerald and Williams*[31] where it was held that the plaintiff in each case did not have constructive notice that the second named defendant had executed the guarantee as a result of undue influence and that there was no obligation on the plaintiff to urge the second defendant to obtain independent legal advice before signing the documentation can be distinguished from the elderly and vulnerable persons cases. (See also *Bank of Ireland V Smyth*)[32]

1.34 The rules laid down in *Barclays Bank v O'Brien*[33] and followed in Etridge would be that banks and financial institutions are

- 'put on inquiry'
- obliged to explain the risks of the transaction and
- have a duty to advise that independent advice be obtained.

1.35 Otherwise the financial institution could be fixed with constructive notice of undue influence and there is the possibility that the transaction may be set aside by a court at the behest of an elderly or vulnerable person.

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29 (No2) [2001] 4 AER 449.

30 [1996] 3 IR 239.

31 HC 9/11/2001.

32 [1995] 2 IR 459

33 [1992] 4 AER 983.

1.36 The Law Reform Commission in its imminent Consultation Paper on the Law and the Elderly will be recommending that the new Financial Services Regulatory Authority should consider implementing codes of practice for financial institutions which require greater protection for vulnerable people.

1.37 As can be seen from the above the law has been developing in very recent years in relation to obligations owed to elderly and vulnerable person where influence has been exercised over them giving rise to the presumption of undue influence which presumption is not easy to rebut. While legislative reform in respect of undue influence is not necessary, what is required is a better awareness of the need for professional advisors and financial institutions to act at all times in the best interests of the elderly or vulnerable person. This awareness can best be dealt with by codes of practice.

PART TWO: ENDURING POWERS OF ATTORNEY (EPA)

2.01 The Enduring Powers of Attorney legislation came into effect in 1996 and at the time contained many safeguards for the protection of donors of such powers that were not contained in similar legislation in other jurisdictions. For example:

- the need for registration of a power when the donor became or was becoming incapable,
- the need for a solicitor's certificate to say the donor was not executing the power 'as a result of fraud or undue pressure',[1]
- the requirement of a doctor's certificate to confirm that the donor 'had the mental capacity, with the assistance of such explanations as may have been given to the donor, to understand the effect of creating the power',[2]
- the requirement to give notice to certain family members of the creation of power,
- the requirement to serve notice of the registration of the power on family members and
- the obligation on the attorney to sign that she/he 'understands the duties and obligations of an attorney and the requirements of registration'.[3]

2.02 Since the inception of the legislation only some 300 EPAs have been registered and to date there have been very few cases coming before the Court which indicate any problem with registration or with attorneys[4] so is there any cause for concern?

2.03 In the Report of the Working Group on Elder Abuse – Protecting out Future[5] the Group recommended that the Enduring Power of Attorney system be re-evaluated. "Namely that:

- Adequate supervision and review be put in place for the EPA in the management of the older person's finances and welfare to prevent possible abuse.
- Awareness campaigns be conducted among health, legal and social care professionals on the benefits of EPA for their clients.
- Measures against abuse be built into the system.

2.04 The Alberta Law Reform Institute (ALRI) in Canada in the Report *Enduring Powers of Attorney: Safeguards Against Abuse*[6] stated:

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1 Section 5(2)(d)(ii).

2 Section 5(2) (d) (iii).

3 Section 5(2) (d) (iv).

4 In the matter of the Powers of Attorney Act 1996 and in the matter of the Instrument creating an EPA executed by Eileen Constance Booth High Court 20 May 1999 the suitability of the attorney was at issue.

5 September 2002 Government Publications at 2.12.

6 Final Report 88 February 2003.

> "The downside of an EPA is that it turns over control of some or all of a donor's property and affairs to another individual, the attorney, whom the donor, because of their mental incapacity or infirmity, cannot effectively supervise. It is possible for an attorney to abuse those powers by using the donor's assets for purposes other than the donor's benefit. For example, an attorney may apply a donor's assets for a purpose beneficial to the attorney rather than for a purpose beneficial to the donor, or an attorney may simply steal the donor's property. Or an attorney who will benefit from the donor's estate may refuse to use the donor's money for proper care of the donor."

2.05 What are the issues in the Irish context that we should be concerned with that would minimise abuse:

A Issues for lawyers

(i) Who is the client?

2.06 This is a fundamental issue. The straightforward position is when a person presents to organise their affairs, to make a will, to obtain advice about their affairs generally the professional advisor will also probably advise that the execution of an EPA is appropriate. In such cases no issue arises as the instructions are being taken directly from the person seeking the advice. However, the more difficult position is where a son or daughter, niece or nephew makes contact to obtain advise for the elderly relative who is becoming forgetful but is capable of making decisions and asks what can be done to organise the elderly person's affaires to minimise future difficulties or the impetus about organising affairs come from a third party. It is imperative that a solicitor is such circumstance decides who he/she is acting for. If the solicitor is advising the elderly person then in advising the elderly person the solicitor owes the duty to advise what is in the best interest of the elderly person. (The issuance of a few note in itself can be telling as to who is the client.)[7]

(ii) Is an EPA appropriate

2.07 In a husband and wife situation the position may be quite simple and the advice may be to appoint each other attorney in the first instance. However, what should then be the advice? Should a solicitor then advise the appointment of a substitute attorney? In non husband and wife situations what advice should be given? Again to reiterate the point, the advice must be what is in the best interest of the client.

Are there children; if so is there sibling rivalry? (See the interesting case of Re W [2000] 1 AER 175 on this point).

Are there substantial assets? What is the value of those assets?

2.08 These latter points are issues which the authors of the chapter on 'Enduring Powers of Attorney' in Finance and Law for the Older Client[8] raise as perhaps being situations where an

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[7] See *Carroll v Carroll* [1998] 2ILRM and *Meredith v Lackschewitz-Martin and another* Ch D [2002] EWCH.

[8] Tolley's/STEP published April 2000.

EPA is not appropriate. In all the circumstances what is the best advice! Good and appropriate advice also includes advising the potential donor of the enduring power of attorney of the alternative of having a registered power in place at the time of incapacity *ie* being made a ward of court. In all the circumstances is this the better option?

2.09 A lack of concern about the responsibilities of the attorney to the donor is a risk factor that features in many examples of misuse of EPAs in many jurisdictions.[9] It must be fully explained to the donor of the EPA that the effect of the EPA will be that the attorney/s will have full control over all their assets.

(iii) Scope of Authority

2.10 An EPA may confer general authority or limited power to act on behalf of the donor of the power. This should also be fully explained as to what precisely this means.

2.11 It is also necessary to explain the implications if more than one person is being appointed and depending on the circumstances advice is required as to whether authority should be given to act jointly or jointly and severely.

2.12 Section 4 of the Powers of Attorney Act 1996 (the 1996 Act) provides that

> "Where two or more persons are appointed (or are deemed to have been appointed) to act jointly, then, in the case of the death incapacity, or disqualification of any one or more of them the remaining attorney or attorneys may continue to act whether solely or jointly as the case may be, unless the instrument creating the power expressly provides to the contrary."

2.13 The issue as to whether the potential donor should appoint joint attorneys will include advice on the greater opportunity for abuse which the appointment of a sole attorney provides. In a relevant case the donor should be urged to consider the possibility of appointing joint attorneys providing greater protection against abuse.

(iv) Revocation

2.14 Good practice would also suggest that a solicitor should also advise the donor of the right to revoke the power prior to registration. Post registration, no revocation of the power of the donor will be valid unless and until the Court confirms revocation.[10]

2.15 Revocation prior to registration, although the legislation is silent on the issue, would it is submitted demand the same requirements *ie* Doctor's certificate and Solicitor's statement as is necessary when the EPA is being executed.

2.16 In some jurisdictions there is an obligation on a legal advisor to inform the client at the time of the execution of the enduring power of their right to revoke such a power.[11] New

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[9] See The Enduring Power of Attorney: An Angel in Disguise or a Wolf in Sheep's Clothing. Julie Roberts – Public Advocate of Western Australia speaking at the 4th International Conference of Public Trustees and Public Guardians, Singapore 17-19 April 2000].

[10] Section 11(a) of the *Powers of Attorney Act* 1996.

Zealand proposes that the solicitor's certificate should contain a statement that he/she advised "as to the donor's right to revoke the power of attorney."

B Issues for Attorneys

(i) Accountability

2.17 It is clear that a number of jurisdictions have been concerned about the accountability of attorneys and the fact that an EPA can be a vehicle for abuse.

2.18 The ALRI[12] recommends that the attorney in addition to being obliged to notify a 'qualified person' (as is the case in Ireland), that an attorney also be obliged to prepare and keep up a list of property and rights over which the attorney takes control and a list of the transactions involving the donor's property and rights.

A 'qualified person' in Alberta is a person who is entitled to receive the notice and also a family member. Although interesting, the ALRI also envisages a situation where the donor of an EPA can specifically exclude a family member under the terms of the EPA from being a 'qualified person.'

2.19 **Is the Irish legislation adequate in having attorneys account for funds over which they have control or does the existing legislation leave open the possibility for abuse to take place?**

2.20 Section 5 of the 1996 Act provides that the Minister for Justice, Equality and Law Reform may make regulations in relation to a number of matters including the keeping of accounts by the attorney in relation to the management and disposal of the donor's property.

2.21 Statutory Instrument No 196 of 1996 at paragraph 17 states to the attorney *"[y]ou are obliged to keep adequate accounts of the donor's property and affairs and to produce the accounting records to the Court if required."*

2.22 Of course there are no guidelines as to what are 'adequate accounts'.

Section 12(2)(b) of the 1996 Act provides that the Court may give directions with respect to:

(i) the management or disposal by the attorney of the property and affairs of the donor

(ii) the rendering of accounts by the attorney and the production of records kept by the attorney for that purpose

(iii) the remuneration or expanse of the attorney…including directions for the repayment of excessive, or the payment of additional remuneration

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[11] See Report 71 – Misuse of Enduring Powers of Attorney Law Commission of New Zealand April 2001.

[12] Enduring Powers of Attorney: Safeguards Against Abuse Final Report No 88 February 2003.

2.23 But the Court will not give any direction unless an application is made to it. At that stage if may be too late as the attorney if they have not kept accounts on an ongoing basis may not be in a position to satisfy the requirement of the Court. In such cases Mr Denzil Lush the Minister of the Court of Protection in England and Wales has made the point that *"on many occasions when the court has ordered an attorney to furnish accounts, the accounts produced by them have been unsatisfactory or unhelpful."* The value of assets of many elderly persons where financial abuse occurs would not merit an application to Court. Without any other obligation on attorneys to make and file accounts means that monitoring the assets of the donor to check whether any abuse has occurred is difficult. This issue needs to be addressed.

2.24 Of course, in addition to the statutory obligations with regards to accounts there are the well-established common law rules that an attorney owes a principal such duties as

- the duty not to enter upon a transaction where there is a potential conflict of interest; an attorney has a duty not to profit from his position

- the duty to keep accounts; and

- the duty to keep the principal's property separate from his/her own.

2.25 In practice, attorneys pay scant regard to this latter requirement of keeping the donor's property separately particularly bank accounts and pension payments[13] but use them as if they owned the proceeds of the accounts. (See below at paragraph under the heading Joint Accounts 2.35) In relation to husband and wife accounts it is generally acceptable that such accounts become mixed and in many cases husbands and wives have joint accounts so it is not usually an issue. For non husband and wife attorneys, the separation of accounts is essential. Attorneys should be reminded that in the event of the death of the donor they will have to account fully for all the assets that came within their stewardship and such assets are assets of the estate of the donor.

2.26 Many would argue that any interference with the operation of the power by the attorney must take account of the fact that the donor of the power personally selected the attorney to be the attorney and the EPA is really a private arrangement. However this cautious approach does not take account of the reality of the situation and increases the risk of abuse and is an issue that cannot be ignored. All the evidence is that EPAs are open particularly to financial abuse and fraud.

2.27 Until a public filing and accounting system is put in place in this jurisdiction, there is nothing to prevent the donor of a power requiring his or her attorney to file accounts to an independent party on a regular basis and to nominate a person in the EPA for such purpose. The EPA legislation does recognise that a donor may indicate who should be consulted with regard to personal care decisions. This of course could be extended to include financial matters.

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13 In *Merdith v Lackshewitz-Martin and another* Ch D [2002]a son placed his mother's pension book into his own name "for reasons of practical convenience"

(ii) Best interests principle

2.28 While the 1996 legislation introduced the principle of 'best interests' it did so in a restricted way. The requirement of an attorney to act 'in the best interests' of the donor is restricted to the attorney's actions in relation to the personal care decisions only made on behalf of the donor. The Act specifies[14] that in deciding what is in the donor's best interests regard should 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 interest:
(I) any person named by the donor as someone to be consulted on those matters;
(II) anyone (whether the donor's spouse, 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."

2.29 The proposed new legislation in England on a Continuing Power of Attorney[15] recommends that there be statutory guidelines on how the best interests of mentally incapacitated people should be determined which will extend to financial decisions, health care decisions and welfare decisions.

2.30 There is a cogent argument for requiring attorneys in this jurisdiction to act in the best interest of the donor of the power in relation to all decisions that affect the donor. It is particularly important where an EPA is registered in many cases where a person still has some capacity (an EPA can be registered when a person is becoming incapable) to try to ascertain the wishes of the donor. One view is that in such circumstances where the donor has some capacity there is an obligation on the attorney to establish the wishes of the donor in any event.

(iii) Good practice

2.31 Good practice would also suggest that at the time of registration of an EPA, professional advisors remind attorneys of their role and obligations in relation to the donor, in particular the following:

- the scope of the authority that they have been given
- the requirement to act 'in the best interest' of the donor
- the requirement to keep accounts
- the requirement to keep the donor's property separate from the attorney/s
- the requirement not to profit from his position as an attorney

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[14] At Section 6(7) (b) *Powers of Attorney Act 1996.*

[15] Green Paper – Who Decides: Making Decisions on behalf of Mentally Incapacitated Adults (CM 3803) 1997.

- if relevant, the requirement to keep named individuals informed. (Even if not required by the instrument to keep named individuals informed the better course particularly in family situations is to keep family members generally informed say annually of transactions in relation to the donor's property similar to the recommendation now been suggested in Alberta, Canada)

2.32 The attorney should also be reminded when the EPA is taking effect that he/she confirmed at the time of the execution of The EPA that he/she understood the duties and obligations of an attorney under an EPA.[16]

C Other issues in relation to EPAs

(i) Role of Financial Institutions

2.33 Have financial institutions any obligation to mentally incapable persons whose accounts are being operated under an EPA?

2.34 There must the general principle that they are put on notice of the agency nature of an EPA and therefore should ensure that the accounts are preserved in the name of the donor of the power of attorney and the fact of the registration of the power is noted on the account rather than allowing a complete transfer the proceeds of an account into the name of the attorney unless the EPA directs otherwise.

(ii) Joint Accounts and EPAs

2.35 What is the position of joint bank accounts on the registration of an EPA? Does the agency rule apply and does the agency terminate on the registration of the EPA? (See below under joint bank accounts paragraph 3.05). If the agency rules do apply then joint operation of the joint account terminates on registration and the account then comes within the (agency) remit of the attorney.

(iii) Making of wills by the donors of registered enduring powers of attorney

2.36 Another lacuna in the legislation is what is the position if a donor of a registered EPA wishes to make or amend a Will? Is it necessary to have Court involvement or is it sufficient to obtain medical and legal evidence that the donor had the necessary capacity at the time of making the will? The legal position is that on the registration of the EPA there is a presumption of incapacity and the onus is then on the person arguing capacity to prove it.[17]

2.37 It is clear that EPAs have the potential to be misused The ALRI points out that the advantage of an EPA is that it enables an honest attorney to look after the affairs of the donor

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16 SI No 196 of 1996 First Schedule Part C.

17 In England legislation does provide (Mental Health Act 1983) that the court can authorise the execution of a statutory will on behalf of a donor of an EPA.

efficiently. The downside is that it enables a dishonest attorney to misuse the money and property of the donor.[18]

2.38 Julie Roberts's stated:[19] paper delivered at the 4th International Conference of Public Trustees and Public Guardians in Singapore in April 2000

> "The EPA is one of the most powerful planning tools being introduced and promoted world-wide. The demand for their availability is increasing but the risk of misuse of the EPA cannot and must not be denied. Many who work with these documents and the victims of their misuse are calling on governments to better safeguard those who wish to take up this tool. Governments do need to take care, to review their legislation and implement safeguards. However, this is not a task that governments can do alone. The financial and business sector also has a role to play in examining its policies and implementing safeguards."

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[18] Alberta Law Reform Institute Enduring Powers of Attorney: Safeguards Against Abuse final Report No 88 February 2003.

[19] The Enduring Power of Attorney: An Angel in Disguise or a Wolf in Sheep's Clothing. Julie Roberts Public Advocate of Western Australia speaking at the 4th International Conference of Public Trustees and Public Guardians, Singapore 17-19 April 2000.

PART THREE: JOINT ACCOUNTS

(i) Survivor account

3.01 By common law where an account has been opened in joint names banks owe a contractual duty jointly and severely to each account holder of the joint account. The law was clarified in Ireland in 1996 in the case of *Lynch v Burke.*[20]

3.02 In Lynch v Burke a bank account was opened in the joint names of an aunt and niece, money was lodged into the account by the aunt and the account was subject to the direction that the monies were *"Payable to Frances McFadden only or survivor"*. Frances McFadden being the aunt and the survivor being the niece Moira Burke. Up until the decision in this case, when a survivor did not provide the money for payment into the account his/her position was tenuous, the money could go on a resulting trust to the estate or it would have been a revocable gift unless the presumption of advancement applied.

3.03 The trial judge in the case found that it was the aunt's intention to benefit her niece but it was also her intention that should she predecease her niece her niece should be entitled to the balance in the account but found that he was bound by the decision in *Owens v Greene*.[21] The Supreme Court in *Lynch* (overruling *Owens v* Greene) held that the survivor

> "niece had a legal interest in the money on deposit either by reason of the contract made by the bank jointly and severely with the account holders. Alternatively the Court held that the opening of the account was a gift subject to a contingency (the death of the deceased) and that this gift should be given effect to."[22]

(ii) Agency account

3.04 But what is the position if the joint bank account is opened for the convenience of an elderly person where there is no intention to benefit the joint account holder either in the lifetime of the elderly person or after his/her death? In such cases there is no intention to transfer any interest and the doctrine of resulting trust still operates to determine who gets the money *ie* the estate of the deceased. There is a resulting trust of the proceeds of the joint account to the estate of the deceased.

3.05 If before death the elderly joint account holder becomes mentally incapacitated what is the position? Can the other joint holder (who has a legal interest in the account) continue to operate it? It is difficult to find an authority on the point but surely the arrangement can be viewed as one of agency only which agency terminates when the principal becomes incapable. If a relationship of agent and principal is created the question arises as to the extent of the powers enjoyed by the agent and the circumstances in which such agency terminates. In the case of a joint bank account (opened for the convenience of the principal) the agency would extend to deposits and withdrawals from the account on whatever terms are agreed between principal and agent and the financial institution concerned.

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20 *Mary Lynch v Moira Burke and Allied Irish Banks plc* 1 ILRM 114.

21 [1932] IR 225.

22 Dr John Breslin Commercial Law Practitioner January 1996.

3.06 The agency may of course be terminated whether by act of the parties or by operation of law – this latter category includes termination of agency on the death either of the principal or agent or also by the mental incapacity of the principal or agent. The authority for the proposition that insanity of the principal terminates the authority of the agent in that the agreement between principal and agent becomes void in the event of such mental incapacity is the case of *Drew v Nunn.*[23]

3.07 Today it is not sufficient for financial institutions to simply open joint accounts particularly in relation to elderly and vulnerable customers without establishing the nature of the account. Is it a joint account such that the 'survivor' is entitled to the proceeds or is it a convenience account or 'agency' account?[24]

When such accounts are being opened it is surely desirable that it be recorded in writing so that the financial institution, the elderly person and the agent are clear about what is intended and what powers the agent has over the account.

(iv) Other issues for financial institutions and joint accounts

3.08 Many financial institutions although on constructive notice that joint accounts are merely 'agency' account do not regard themselves as having any obligation towards the elderly or vulnerable principal. How often are we aware of a joint account holder literally 'robbing' the account and the financial institution turning a blind eye to large withdrawals over very short periods of time? And to whom does a disinterested third party make a complaint when they become aware of such abuse?

3.09 This is another area where the new Financial Services Regulatory Authority should implement codes of practice.

CONCLUSION

In conclusion, the trend has now rightly sifted in favour of elderly and vulnerable persons. Professional advisors and financial institutions need to have a clear view of their obligations to such people. Otherwise transactions, that do not take account of factors which have been outlined, may be held to be void at a later stage. It should also be noted that time itself may not cure such defects. See the comments of Mr Justice Shanley in the High Court in *Carroll v Carroll*[25] in relation to the fact that delay will not be a bar to relief sought.

Patricia T Rickard-Clarke
16 May 2003

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23 (1879) 4 QB 661.

24 As described on the New York City Department for the Ageing website for elderly persons – Taking Care of Business: Protecting Yourself and Your Assets www.nyc.gov.

25 [1998] 2 ILRM 218.