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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **13/04/2026**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

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IN THE MATTER OF JG

AND IN THE MATTER OF AN APPLICATION TO REGISTER AN ENDURING POWER OF ATTORNEY

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Keith Gibson (instructed by Cleaver Fulton Rankin) for the Appellant
William Gowdy KC & Julie Ellison (instructed by the Official Solicitor) for the Official Solicitor as Controller ad Interim

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HUMPHREYS J

Introduction

[1] This is an appeal from a decision of Master Wells dated 12 June 2025 whereby she refused to register an Enduring Power of Attorney ("EPA") in respect of JG, the appellant.

[2] The appellant is a 30-year-old man who, as a result of medical negligence, has a diagnosis of cerebral palsy and a learning disability. On 24 March 2009, he was awarded a sum of £3,242,690.05 in damages and it was ordered that this sum be invested in court at the direction of the Accountant General.

[3] On reaching the age of 18, the appellant's parents, BM and LG, were appointed as his controllers. His father was discharged in October 2017 and his mother acted as sole controller until 31 May 2024 when Michael Graham, solicitor in the firm of Cleaver Fulton Rankin, was appointed as co-controller.

[4] On 18 October 2024, the appellant executed an EPA appointing his mother and Cleaver Fulton Rankin Trustees Limited as his attorneys for the purposes of the Enduring Powers of Attorney (Northern Ireland) Order 1987 ("the 1987 Order") with general authority to act on his behalf in relation to all his property and affairs.

[5] On 15 January 2025, the appellant applied to the court for an order discharging the controllership order and registering the EPA. The Master refused this application on 12 June 2025 and gave her reasons on 13 October 2025.

The application for registration

[6] The application was grounded on an affidavit sworn by Mr Graham on 15 January 2025. He stated that he had become aware the patient had a significant level of capacity and therefore took steps to have an assessment carried out by Dr English. This report was exhibited and confirmed that the applicant had the requisite capacity to create an EPA.

[7] The instructions taken by Mr Graham were to the effect that the applicant wished to appoint two attorneys, namely his mother and Cleaver Fulton Rankin Trustees Limited, on a joint basis.

[8] An EPA was then drawn up and executed on 18 October 2024.

[9] On 23 October 2024, the Master expressed her displeasure at the approach adopted and appointed the Official Solicitor as controller ad interim.

[10] A report was prepared by Jonathan Killen, solicitor, on behalf of the Official Solicitor's office. This is a comprehensive piece of work and it makes the following findings and recommendations:

(i) The appellant was frustrated and felt that people did not listen to him, particularly around access to his money;

(ii) In particular, the appellant wanted money to make improvements to his workshop and to fix his swimming pool;

(iii) These feelings were shared by the appellant's mother who was also hurt by the suggestion that she had done anything any other than seek to help her son;

(iv) There was no indication that Mr Graham had behaved in any way inappropriately;

(v) Accordingly, there was no basis whatsoever for the suspension or discharge of the controllers; and

(vi) A review of the arrangements for the management of the appellant's finances was warranted.

[11] On 27 January 2025, Mr Graham raised a number of issues in relation to the funds held in court and their management, including:

(i) Whether any assessment of the appellant's attitude to risk had been undertaken;

(ii) Whether any cashflow modelling has been conducted to project his income needs over his lifetime;

(iii) Whether any tax planning had been undertaken;

(iv) Whether an ISA had been considered to take advantage of tax reliefs; and

(v) Whether a SIPP had been considered.

[12] If the EPA were to be registered, the outline plan was to withdraw the funds from the Court Funds Office and have them managed with a view to maximising tax reliefs and ensuring that the investment strategy accorded with the appellant's future needs and wishes.

[13] A hearing of the registration application was fixed for 7 May 2025. Prior to this date, position papers were prepared. Counsel instructed by the Official Solicitor submitted that if the appellant had capacity to execute an EPA, then that should take effect. Registration would respect the appellant's autonomy and be in accordance with his article 8 Convention rights. Mr Graham adopted and endorsed the submissions of counsel.

[14] At the hearing the Master raised the issue of Article 8(2) of the 1987 Order and whether the legislature intended a private instrument to "trump" the supervision of the court in the management of a substantial compensation award for an incapacitous adult.

[15] As a result, a joint position paper was filed by the co-controllers and the Official Solicitor. In this, it was stressed that Article 8(2) empowers the court to register an EPA even where there is a controllership order in place. It was submitted, by agreement, that the court does not enter into a risk/benefit analysis of comparing the different regimes. Put simply, provided the donor had capacity to create the EPA, and there are no other vitiating factors, it should be registered. The appointed attorneys have fiduciary duties and the court retains supervisory jurisdiction under Article 10(2) of the 1987 Order.

[16] The parties stated:

> "While is it is important to have safeguards in place, it is submitted that it would be disproportionate to require that [JG's] property and affairs be subject to the controllership regime, when [JG] has expressed a desire to have them dealt with by Attorneys of his choosing, under the relative

> informality of the 1987 Order regime… The EPA regime is to be preferred as it respects the dignity and autonomy of the individual and gives, where the person has the requisite capacity, the ability to choose who will act on their behalf"

The medical evidence

[17] There were two medical reports before the Master from Dr English dated 22 April 2024 and 19 October 2024. In the first of these, Dr English found that the applicant lacked the capacity to donate an EPA but that he was building his experience and skills in managing money and it was possible that he may achieve sufficient appreciation in the future so as to enable him to validly donate an EPA.

[18] Six months later, Dr English carried out a further evaluation. Oddly, she did not reference her previous analysis in this latter report. She concluded that on 9 October 2024 the applicant had the necessary capacity to donate an EPA which would be subject to immediate registration.

[19] In arriving at that conclusion, Dr English referenced four issues which the applicant required to understand:

(i) The attorney will be able to assume complete authority over the donor's affairs;

(ii) The attorney will in general be able to do anything with the donor's property which he himself could have done;

(iii) The authority will continue if the donor should be or become mentally incapable; and

(iv) If he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.

[20] Dr English was satisfied, from her interviews and observations, that the applicant demonstrated the necessary understanding of each of these areas.

The Master's decision

[21] On the Master's analysis, the intention behind the creation of the EPA in the instant case was to seek to have the significant sum of compensation managed "out of court" with "effectively no protective oversight by the court." She observed that there was no provision in the 1987 Order for an EPA to be used for this purpose.

[22] The Master also commented that there are stringent safeguards in place to ensure effective oversight of the management of funds in court. She stated that to use an EPA to manage compensation funds for those who lack capacity to manage their

affairs would expose patients to "unnecessary risk" and would lead to a lack of oversight of fees being charged.

[23] The application was refused for the following reasons:

(i) The instruction of the medical expert fell short of the standards expected by the court;

(ii) The medical evidence did not persuade the court that the applicant understood all relevant matters;

(iii) The court had concern about the potential conflict of interest of Michael Graham, who was both the solicitor for the applicant and a director of Cleaver Fulton Rankin Trustees Limited;

(iv) The law, practice and jurisprudence in Northern Ireland for managing patients' funds is not comparable to that in England & Wales due to the delays in implementing Mental Capacity Act (Northern Ireland) 2016;

(v) The court declared itself content with the arrangements, performance and scrutiny of the investment arrangements for the award in this case.

The evidence since the Master's decision

[24] As is well-established, an appeal from the Master is by way of a *de novo* hearing and the court hearing the appeal has a discretion to admit fresh evidence. By agreement of the parties, and in exercise of this discretion, further evidence was admitted in the form of expert evidence and affidavits.

[25] On the application of the Official Solicitor a further expert psychiatric report was obtained from Dr Patrick Hann. This report, dated 14 February 2026, concluded that the appellant had the necessary capacity to execute an EPA. Dr Hann found:

> "[JG] was clear that his primary objective in wanting to make an Enduring Power of Attorney was to have a means of more readily accessing his money when he required same. On taking him through each piece of information he was required by law to understand, he was asked both general and person-centred questions in order to ascertain his understanding and retention of same."

[26] This conclusion was arrived at following a consideration of each of the four issues addressed by Dr English.

[27] The court also had the benefit of three further affidavits, from Michael Graham, LG and Stephanie Fox, on behalf of the Official Solicitor's office.

[28] In the first of these, Mr Graham set out the background to the application for registration. He had met the appellant's mother at an event and, following discussion, put her in direct contact with Dr English, which resulted in the April 2024 report. Following that, Mr Graham was appointed as co-controller and met the appellant in July 2024. His initial observations were that the appellant was a capable young man and arranged for the further report from Dr English. He expressly sought approval for this course of action in a letter of 30 July 2024.

[29] With the Master's approval, Mr Graham commissioned two reports from financial planners in relation to the appellant's affairs.

[30] He also explained the role of Cleaver Fulton Rankin Trustees Limited, a wholly owned subsidiary of Cleaver Fulton Rankin Limited, incorporated as a trust corporation in 2012. It does not actively trade and has no direct or indirect financial connection with any investment provider, nor does it or Cleaver Fulton Rankin Limited receive any remuneration if a referral is made to an investment provider. The trust corporation is directly comparable to the appointment of an individual solicitor in any of the roles of executor, trustee or attorney.

[31] The affidavit from the appellant's mother describes him as a bright articulate man who has worked hard to overcome his problems. He works hard at his business of making garden furniture. He has a particular love of travel.

[32] The evidence sets out some of the difficulties that have been encountered in accessing the appellant's funds. None of this is meant as a criticism of those officials who oversee the management of the monies but is a reflection of the reality of having to make applications on a regular basis. Such delays led, for example, to the appellant's swimming pool being out of commission for two years.

[33] It is also apparent that the appellant has a tax liability to pay each year. The reports from the financial planners reveal how certain steps to minimise this liability are not being taken. The appellant's mother's view was that the proposed EPA arrangement would be more flexible and responsive to the needs of her son.

[34] Ms Stephanie Fox of the Official Solicitor's office also swore an affidavit, having assumed responsibility for the case following the departure of Mr Killen. In light of the divergent views expressed in the reports of Dr English, she felt it necessary to obtain a further expert opinion on the issue of whether the appellant had the requisite capacity to execute the EPA.

[35] On 5 March 2026, three working days prior to the hearing of the appeal, Ms Fox raised certain concerns following consultations which had taken place with the appellant. This prompted an addendum report from Dr Hann but his opinion in relation to capacity was unchanged.

[36] It also became evident, at this very late stage, that the opinion of those instructed by the Official Solicitor in relation to the legal position had altered. It was sought to contend that for an EPA to registered in such circumstances the court ought to be satisfied not only that the donor had the requisite capacity but also that such registration was in his best interests.

[37] Reliance was placed on a text book entry citing a judgment from the court of lunacy from 120 years ago and an Australian case dealing with a quite different statutory scheme to support this proposition. No explanation was afforded as to how principles previously set out had been departed from. This last minute volte-face from the submissions made to the Master and set out in the skeleton argument for this court was perplexing, given the lack of any authority for the proposition advanced.

The legal principles

(i) Capacity

[38] Article 2(2) of the 1987 Order defines "mentally incapable" or "mental incapacity" as meaning:

> "he is incapable by reason of mental disorder of managing and administering his property and affairs"

[39] Only Parts 1, 2 and 3 of Mental Capacity Act (Northern Ireland) 2016 ("the 2016 Act") are in force. Section 1 sets out principles which must be complied with where a determination falls to be made in relation to capacity "for any purpose of this Act":

> "(1) There is a presumption of capacity which applies unless it is established that the person lacks capacity in relation to the particular matter;
>
> (2) Whether or not the person is able to make a decision for himself or herself about the matter is to be determined solely by reference to whether the person is or is not able to do the things mentioned in section 4(1)(a) to (d), not on the basis of any condition or characteristic;
>
> (3) The person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success;
>
> (4) The person is not to be treated as unable to make a decision for himself or herself about the matter merely because the person makes an unwise decision."

[40] By section 3(1) of the 2016 Act:

> "For the purposes of this Act, a person who is 16 or over lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself about the matter (within the meaning given by section 4) because of an impairment of, or a disturbance in the functioning of, the mind or brain."

[41] Section 4 provides:

> "(1) For the purposes of this Part a person is "unable to make a decision" for himself or herself about a matter if the person—
>
> (a) is not able to understand the information relevant to the decision;
>
> (b) is not able to retain that information for the time required to make the decision;
>
> (c) is not able to appreciate the relevance of that information and to use and weigh that information as part of the process of making the decision; or
>
> (d) is not able to communicate his or her decision (whether by talking, using sign language or any other means);
>
> and references to enabling or helping a person to make a decision about a matter are to be read accordingly."

[42] In *Belfast Health and Social Care Trust v PT* [2017] NIFam 1, McBride J set out that, at common law:

> "A person is presumed to have capacity until the contrary is established. Capacity is "issue specific" in that a person may have capacity for one purpose but lack capacity for another purpose." (para [26])

[43] The provisions of the 2016 Act in relation to the creation of lasting powers of attorney (Part 5) are not yet in force, despite being on the statute book for 10 years. Section 97(2), once commenced, will provide that a lasting power of attorney can be created only if, at the time of execution, the donor has capacity to execute it.

(ii) Registration of an EPA

[44] In *Re K; Re F* [1988] Ch 310, Hoffman J explained the purpose of the legislation governing EPAs:

> "The Act was intended to provide an inexpensive method by which a person could confer power to manage his affairs on a person of his own choice which would remain effective notwithstanding any change in his mental capacity."

[45] The nature of an EPA is such that it is not revoked by the subsequent mental incapacity of the donor. Article 3 of the 1987 Order provides that where an individual creates an EPA, and he subsequently becomes mentally incapable, the donee of the power may only act on foot of it once it has been registered by the court. Where an attorney has reason to believe that a donor is becoming mentally incapable, he is obliged, by Article 6(2), to apply to the court for registration.

[46] Notice must be given of an application for registration to the donor's relatives who are entitled to object on any of the grounds set out in Article 8(5):

> "(a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney;
>
> (b) that the power created by the instrument no longer subsists;
>
> (c) that the application is premature because the donor is not yet becoming mentally incapable;
>
> (d) that fraud or undue pressure was used to induce the donor to create the power;
>
> (e) that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney."

[47] Where a controllership order is in place then Article 8(2) states:

> "Where it appears to the court that there is in force under part VIII of the Mental Health (Northern Ireland) Order 1986 an order appointing a controller for the donor but the power has not also been revoked then, unless it directs otherwise, the court shall not exercise or further exercise its

functions under this Article but shall refuse the application for registration."

[48] Article 10 of the 1987 Order gives the court continuing supervisory powers following registration of an EPA:

> "(2) 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 affairs of the donor;
>
> (ii) the rendering of accounts by the attorney and the production of the records kept by him for the 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;
>
> (c) require the attorney to furnish information or produce documents or things in his 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 so as to benefit himself or other persons than the donor otherwise than in accordance with Article 5(4) and (5) (but subject to any conditions or restrictions contained in the instrument);
>
> (f) relieve the attorney wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as attorney."

(iii) Capacity to create an EPA

[49] The legislation is silent on the question of the capacity required to validly create an EPA, as was its analogue in England & Wales, the Enduring Powers of Attorney Act 1985. The question which arose for determination in *Re K; Re F* was whether the power created by the instrument was valid if the donor understood the nature and effect of an EPA notwithstanding that she was at the time of its execution incapable by reason of mental disorder of managing her property and affairs.

[50] In order to understand the nature and effect of the power created, Hoffman J held that donor must understand the following:

> "First, (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (if such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."

[51] It will be evident that these four issues are those which both Dr English and Dr Hann were asked to opine upon. This illustrates the influence which the judgment of Hoffman J has had in this area of practice.

[52] In arriving at his decision, Hoffman J was cognisant of the policy of the legislation and the safeguards which it places:

> "The exercise of the power is thus hedged about on all sides with statutory protection for the donor. In these circumstances it does not seem to me necessary to impose too high a standard of capacity for its valid execution."

[53] This case has been followed frequently by the courts in England & Wales prior to the enactment of the Mental Capacity Act 2005, and in Northern Ireland to the present day. It is the authoritative statement of principle in relation to the capacity required to create an EPA, as recognised by the editors of Heywood & Massey on Court of Protection Practice at 11-006 and by Cretney & Lush on Lasting and Enduring Powers of Attorney (9th Edition) at 16.7 who conclude:

> "…someone with limited capacity may, nevertheless, have executed a valid enduring power, even though they may have been incapable, by reason of mental disorder, of managing and administering their property and affairs."

[54] Significantly, there is no suggestion that the court considering an application to register an EPA need take into account the best interests of the donor, whether in the legislation itself or in any of the jurisprudence.

(iv) Controllership and court funds

[55] Part VIII of the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order") and Order 109 of the Rules of the Court of Judicature (Northern Ireland) 1980 provide the statutory framework for the management of the property and affairs of individuals who have been found to be incapable of such management, by the court. The Court Funds Office holds and deals with such assets, in accordance with Part VII of the Judicature (Northern Ireland) Act 1978 and the Court Funds Rules (Northern Ireland) 1979, acting under the direction of the Master (Care and Protection).

[56] These rules give the Accountant General a wide power to invest funds, including by the acquisition of stocks and securities (see *Northern Ireland Courts and Tribunals Service v Official Solicitor* [2013] NICA 53). The management of such funds and investment is subject to oversight by the Court Funds Judicial Liaison Group.

[57] The court may, pursuant to Article 101 of the 1986 Order, appoint a controller to do all such things in relation to the property and affairs of a patient as may be directed by the court. This jurisdiction arises in the case of a "patient", who is defined, by Article 97(1) of the 1986 Order as a person:

> "incapable, by reason of mental disorder, of managing and administering his property and affairs"

Consideration

[58] The starting point for consideration of the registration application must be Article 8(2) of the 1987 Order since, in this case, there is in place an order appointing controllers under Part VIII of the 1986 Order. In such circumstances, registration must be refused unless the court directs otherwise.

[59] When there is a controllership order, by virtue of Article 97(1) of the 1986 Order, the court has already been satisfied that the person is incapable, by reason of mental disorder, of managing and administering his own affairs.

[60] However, as is apparent from *Re K; Re F* that fact alone does not prevent an individual from executing a valid EPA. Capacity is an issue-specific question.

[61] In this case, the psychiatric evidence before the court clearly establishes that the appellant had capacity to execute an EPA in October 2024. On each of the four issues identified by Hoffman J, both Dr English and Dr Hann were satisfied that the appellant had the requisite level of understanding.

[62] It is important, in such circumstances, to recognise the principle of autonomy. The modern approach to capacity, as reflected in the MCA 2016, is to empower individuals to make their own decisions and to respect them, even if a different decision could have been made or outcome arrived at. The courts still have a paternalistic role to play but this should only be engaged where the requisite capacity is found to be lacking.

[63] On the basis of the evidence and established legal principle, the validity of this EPA should therefore be recognised by its registration. I therefore allow the appeal from the Master and will order that the controllership order be discharged and the EPA registered.

[64] In her judgment the Master raised certain other issues and I also propose to address these.

[65] Insofar as the medical evidence is concerned, the position both in relation to the instruction of Dr English and the discordance between her two reports was less than satisfactory. On appeal, however, any such concerns were assuaged by the instruction and reporting of Dr Hann.

[66] The proposed arrangement whereby a trusted family member and a professional trust corporation are appointed as attorneys strikes a sensible balance. There is no conflict between Mr Graham providing legal advice as a solicitor in Cleaver Fulton Rankin and the wholly owned trust company acting as attorney.

[67] The Master expressed concerns about the control and oversight exercised whilst the funds are in court being lost. However, the attorneys owe fiduciary duties and Mr Graham owes professional duties as a solicitor. There is no suggestion that any of these duties will be breached.

[68] In any event, Article 10(2) of the 1987 Order still permits oversight by the court. It can give directions to the attorney, require the production of accounts and records and scrutinise remuneration. If excessive remuneration has been charged, it can order same to be repaid. There is no evidential basis to conclude that any of the appellant's funds are being placed at risk by virtue of the registration of the EPA.

[69] Even if one were to apply a best interests test, which is not the legal test for registration, it is apparent that the use of the EPA as a vehicle to manage the appellant's funds has significant advantages:

(i) His money is readily accessible and the attorneys can respond swiftly to any requirements which arise;

(ii) The appellant will be able to use his annual ISA allowance to create a tax free income stream;

(iii) Pension contributions and other investments can be used to mitigate his tax liability;

(iv) Consideration can be given to the creation of a personal injury trust; and

(v) Steps can be identified which may reduce future inheritance tax liability.

Conclusion

[70] I therefore order as follows:

(i) The appeal from the Master is allowed;

(ii) The controllership order dated 31 May 2024 is discharged;

(iii) The EPA dated 18 October 2024 be registered; and

(iv) The investments be transferred out of Court Funds in accordance with the written direction of the attorneys;

(v) The costs of the application and appeal, including those of the Official Solicitor, be borne by the patient out of the said funds, such costs to be taxed in default of agreement.