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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF AW, a Patient

CONSIDERATION OF INVESTMENT OF A PATIENT'S PERSONAL INJURY AWARD OUT OF COURT VIA AN ENDURING POWER OF ATTORNEY

Brendan Kearney Solicitors for the Applicant

MASTER WELLS (CARE and PROTECTION)

Introduction

[1] There is no dispute in respect of the factual matrix. This judgment provides a checklist when considering an application to invest a Patient's personal injury award out of court via an Enduring Power of Attorney.

[2] AW is a 44-year-old man who, as a result of a severe traumatic head injury inflicted in 2016, was awarded £1,850,000.00 criminal injury compensation in April 2026. The compensation monies were paid into court on 2 April 2026, and a First Investment Meeting took place three weeks later in accordance with Practice Note 1 of 2024 Investment of Awards to Patient (https://www.judiciaryni.uk/judicial-decisions/practice-note-1-2024-investment-awards-patient).

[3] In anticipation of the criminal injury compensation claim AW's mother, CW, filed a controller application form in March 2022 and upon completion of the Office of Care and Protection (OCP) due diligence process she was appointed as Controller on 23 August 2022 with authority to manage AW's property and affairs.

The medical evidence

[4] In addition to the medical and other reports prepared for the criminal injury claim, a Form F5 Medical Certificate dated 24 January 2022, plus a letter of the same date were prepared by Dr Michael Curran, Consultant Psychiatrist who stated that

in his opinion AW was incapable by reason of mental disorder as defined in the Mental Health (Northern Ireland) Order 1986 of managing his property and affairs. The doctor noted that AW was unable to calculate monies and had minimal knowledge of his benefits or savings.

First investment meeting

[5] AW attended the First Investment Meeting with his parents and solicitor in April 2026. The court was impressed by AW's apprehension of his compensation award and directed his Solicitor to obtain an up-to-date capacity report in respect of AW's capacity to manage his property and affairs; to create a valid Enduring Power of Attorney; and testamentary capacity. The draft letter of instruction was approved by the court, which set out details of AW's award and financial affairs. Dr Curran's updated report dated 23 June 2026 concluded that in his opinion AW continues to require assistance from others to administer his monies, savings and assets, and will do so throughout the remainder of his life cycle, but AW has capacity to create both an Enduring Power of Attorney and a will.

[6] The court then invited AW's solicitor to take considered instructions in respect of AW creating an Enduring Power of Attorney and filing a Form 3 Application for registration. In the Solicitor's detailed response, the court was informed that it was the view of CW (the mother and Controller); AW's father and AW:

> "that the service offered by the OCP and the Court Funds Office provided very solid protection for 'AW' and 'CW' indicated unequivocally that the 'W' family to include 'AW' were very comforted by the fact that OCP was overseeing the finances and that the investment in Court Funds seemed to be in the best interests of 'AW' and that his needs have been very well met in that arena. 'CW' commented that she would be worried that if Attorneys were appointed that 'AW' would suffer financially if they 'got it wrong' in the context of investing funds that didn't perform for example. She also commented that none of the 'W' family would be willing or prepared to shoulder that responsibility when there was a perfectly good option in the form of OCP and Court Funds overseeing things for 'AW.'"

[7] The solicitor spoke to AW directly and he confirmed that he did not wish to appoint Attorneys as he was very happy with the current arrangements.

The legal principles

(i) Capacity to manage property and affairs

[8] Part VIII of the Mental Health (Northern Ireland) Order 1986 sets out the jurisdiction of the court in relation to property and affairs of patients. Article 97(1) states:

> "The functions of the High Court under this Part shall be exercisable where, after considering medical evidence, the court is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs; and a person as to whom the court is so satisfied is referred to in this Part as a patient."

[9] Article 3(1) states:

> "'mental disorder' means mental illness, mental handicap and any other disorder or disability of mind." See Article 3(1) for other definitions.

(ii) Capacity to create an Enduring Power of Attorney

[10] Article 2(2) of The Enduring Powers of Attorney (Northern Ireland) Order 1987 defines 'mentally incapable' or 'mental incapacity' as meaning:

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

[11] "Mental disorder" has the same meaning as within the Mental Health (Northern Ireland) Order 1986.

(iii) Mental Capacity Act (Northern Ireland) 2016

[12] Only certain provisions are in force: namely research; deprivation of liberty; and money and valuables in hospitals and residential settings. The wider provisions and protections, such as supporting a person to make decisions; creating a lasting power of attorney for 'care, treatment and personal welfare' or 'property and affairs; and appointment of a 'property and affairs' deputy are not in force despite the Act being on the statute books for over 10 years.

(iv) Case Law for capacity to create an Enduring Power of Attorney

[13] In *Re K; Re F* [1988] Ch 310 Hoffman J explained the purpose of legislation governing an Enduring Powers of Attorney:

> "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."

[14] Hoffman J held that in order to understand the nature and effect of the power created, the 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; second, 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 the donor could have done; third, that the authority will continue if the donor should be or become mentally incapable; fourth, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."

(v) the letter of instruction

[15] At para [47] in the case of *In The Matter of BS* [2009] NIFam 5 Stephens J (as he then was) directed that the instructions to the expert would be settled by the court; at para [45] Stephens J stated:

> "the medical examiner has to know the nature and complexity of her affairs."

[16] At para [22] in the case of *In The Matter of The Estate of Terence Benedict McQuaid (Deceased)* [2022] NICh 18 Humphreys J emphasised the importance of the medical expert seeking and obtaining a copy of the solicitor's attendance note and taking it into account in forming their opinion on the question upon which they were asked to advise.

(vi) In The Matter of JG [2026] NIFam 9

[17] In this case Humphries J overturned a decision by the Master and allowed an application for registration of an Enduring Power of Attorney; discharged an existing Controller Order and authorised the transfer of personal injury compensation out of court funds "in accordance with the written direction of the attorneys."

[18] In determining the appeal, the Judge was provided with additional up-to-date medical reports by Dr Patrick Hann Consultant Psychiatrist commissioned by the Official Solicitor who concluded that the appellant had capacity to create a valid Enduring Power of Attorney. This concurred with an earlier medical report by

Dr Barbara English Consultant Psychiatrist commissioned by the patient/donor's mother without a letter of instruction.

[19] At para [15] the judge stated:

> "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."

[20] No court supervision under Article 10(2) of The Enduring Powers of Attorney (Northern Ireland) Order 1987 was directed when ordering the transfer of invested personal injury funds in excess of £3,000,000.00 out of court in accordance with the written direction of the attorneys.

Conclusion

[21] AW's criminal injury compensation award remains in court, invested by the court funds investment manager, with investment performance scrutinised by the court and the Court Funds Judicial Liaison Group, and payments out of court subject to judicial approval. AW and his family prefer this protection and transparent investment performance arrangement rather than management arrangements out of court under an Enduring Power of Attorney.

Observations

[22] This case illustrates that not all persons who lack capacity to manage their property and affairs (a patient) but who have sufficient capacity to create an Enduring Power of Attorney will wish to create such a private instrument. A patient may not have a suitable family member, friend or professional person who they would wish to appoint as their property and affairs attorney. Friends and family may prefer the protection afforded by the court and the impartial expertise provided by the court funds office and its investment manager. The case of *JG* offers an option to be explored in suitable cases.

[23] The court's supervisory powers under Article 10(2) of The Enduring Powers of Attorney (Northern Ireland) Order 1987 are invoked in a very small number of Enduring Power of Attorney cases, normally in response to objections or Form EP3 Applications.

[24] The Department of Justice, in parallel to plans to create an Office of Public Guardian, will have to consider the resource issues which were the catalyst for the

application in the *JG* case plus additional resources should the court direct annual supervision of attorney accounts. The Republic of Ireland conducts annual supervision of attorney accounts in Enduring Power of Attorney cases, but there is no annual supervision of attorney accounts in England and Wales or Scotland.

[25] The Department of Finance has been invited to consider the introduction of a rule change to require Enduring Powers of Attorney to be registered, with notice, within three months of creation. This would bring the protection in line with other jurisdictions within the British Isles.

[26] Attached is a checklist for practitioners, potential donors and attorneys who may be considering an application to have a patient's personal injury award paid out of court.

Checklist

(i) Consideration of potential risks.

(ii) Lack of court oversight and 'protection.'

(iii) No security bond should the attorney act inappropriately.

(vi) Can the donor identify a suitable person or persons to act as attorney(s)?

(v) Contents and preparation of the letter of instruction to the medical expert, which may have to be disclosed to the court.

(vi) Consideration of ESA Regulations, Schedule 9, paras 43 and 44; IS Regulations, Sch 10, para 44 and 45 and other statutory provisions to protect means tested benefits if a personal injury award is managed out of court.

(vii) Does the donor understand that there are no screening obligations for attorney appointments (such as a character reference; declaration of any relevant criminal record or civil money judgment/bankruptcy/IVA), whereas there is a screening process for the appointment of controllers.

(viii) How would the donor wish the annual attorney accounts to be checked? How can this best be achieved, and what are the cost implications?

(ix) How will the investment performance of funds invested out of court be scrutinised?

(x) How will the charges and fees of out of court investment managers be scrutinised, and what action can attorneys take if the charges are not agreed?

(xi) If a solicitor or accountant is appointed as a sole or joint attorney they may have to inform their professional body in case the appointment impacts upon their own professional indemnity policy or premium.

(xii) If the award includes compensation for future care, what condition or restriction will the donor insert in the Enduring Power of Attorney to make sure the attorneys ring fence future care compensation. If future care funds are not preserved and future care is required, social services may demand payment of nursing charges. This may have potential for future litigation and testing the attorney indemnity.

(xiii) If a Form EP3 Application is filed, the applicants should demonstrate in the grounding affidavit that consideration has been given to the checklist above, and if appropriate to do so, should consider appending a draft personal injury trust with at least one professional trustee.

[27] This checklist is not an exhaustive list of considerations.