

Guardianship and Administration Board
Hobart

Professor HSBF, on the application of EHF, and

Mrs EIF and Professor HSBF, on the application TJC

GAB No.'s 2312 and 2313 of 2005

REASONS FOR DECISION

Anita Smith (President)
Kim Barker (Board member)
Gerard Dibley (Board member)

Date of Hearing 10 February 2006

Review of enduring powers of attorney – two donors simultaneously executed four instruments with varying attorneys - depression and dementia, effects upon capacity – declaration of invalidity – appointment of an administrator – suitability of administrator - conflicts between joint attorneys

Powers of Attorney Act 2000 (Tas) ss 30, 33, 35

Guardianship and Administration Act 1995 (Tas), ss 51, and 54

1. This matter relates to three applications to review Enduring Powers of Attorney in respect of two persons.
2. The first application, received 13 October 2005 from EHF, requested a review of the Enduring Power of Attorney whereby Professor HSBF appointed each of his three children, the applicant and his sisters, FIF and TJFC as Enduring Attorneys by an instrument dated 25 August 2005 Registered Number PA11366.
3. The second application, received one day later from TJFC requested a review of both the abovementioned instrument and the Enduring Power of Attorney whereby EIF also appointed each of her three children by an instrument dated 25 August 2005 Registered Number PA11367. Although TJC only made one application, it related to two people and technically represents two applications.
4. Because:
 - (i) the two instruments were executed in the same circumstances and at the same time,

- (ii) the facts asserted in each of the applications applied to the same joint assets of the two donors and the same transactions or proposed transactions, and
- (iii) the discretion afforded to the Board in section 11(2) of the *Guardianship and Administration Act 1995* allows the Board to act informally,

the Board saw fit to investigate and hear all three applications together.

5. A hearing initially arranged for 9 December 2005 was adjourned to attempt mediation and to facilitate proper notice to some relevant parties. A subsequent notice of the hearing was sent to interested parties on 27 January 2006. The hearing was convened on 10 February 2006.
6. Both donors and all three attorneys, investigation staff of the Board and a representative of the Public Trustee attended the hearing. HSBF was accompanied by an Aged Care advocate, Hilary Brown. A support person, long-term friend, MR, accompanied Mrs EIF.
7. The hearing commenced at 10.30 a.m. and concluded at approximately 4.30 p.m., with a lunch break between 1 p.m. and 2.30 p.m. during which time the Board and parties considered some hospital records that arrived during the hearing. At the commencement of the hearing, the Board interviewed Mrs EIF separately (with her support person) about issues raised in the applications, because of concerns previously raised with the Board that her anxiety condition would be a significant impediment to her meaningful participation in the hearing. She chose to leave after that interview. HSBF joined the hearing at the same time as all other parties, but did not join the hearing after the 1 p.m. break.

History relevant to Mrs EIF

8. EIF is 83 years of age. She has been married to HSBF since she was 25 years of age. She had four children; sadly one was still born. She has worked as a librarian, a secretary and in home duties. EIF first experienced a 'breakdown' at the age of nineteen. Drs Burgess-Watson and McArthur have treated her for depression since the 1970's. In recent times, a significant cause of anxiety for

EIF has been to see her husband's decline in health and mental capacity due to dementia. She and her husband are presently in an Aged Care facility, called B Hostel.

History relevant to Professor HSBF

9. HSBF is 84 years of age. He has been married to EIF since he was 26 years of age. Following a period of service in World War II, HSBF graduated from University [*detail of an illustrious career removed to protect identity*]. For approximately one year before the application, HSBF has suffered from a dementia, probably of Alzheimer's type.

Legislation:

10. The application for advice and directions arises from section 35 of the *Powers of Attorney Act 2000*:

“35(1) An attorney under an enduring power of attorney may apply for advice or direction by the Board on any matter relating to the scope of his or her appointment as such or the exercise of any power by the attorney under the enduring power of attorney.

- (2) ...
- (3) ...
- (4) The Board may –
 - (a) approve or disapprove of any act proposed to be done by the attorney; and
 - (b) give such advice or direction as it considers appropriate; and
 - (c) vary the effect of the enduring power of attorney or make any other order that it could have made on an application under section 33. ...”

Relevant parts of section 33 of the Act provide:

“33.(1) The Board may – ... (b) on application by an attorney; ... hold a hearing in accordance with Division 1 of Part 10 of the *Guardianship and Administration Act 1995* to review an enduring power of attorney.

33(2) On the review, the Board may, by order – ...

- (c) appoint an administrator of the estate of the donor if he or she is over the age of 18 years; or
- (d) declare that the donor did or did not have mental capacity to make a valid enduring power of attorney; or

- (e) declare that the enduring power of attorney is invalid if the Board is satisfied that –
 - (i) the donor did not have the mental capacity to make it; ...
 - (f) revoke the enduring power of attorney and, if the donor is over the age of 18 years and the Board thinks fit, appoint an administrator of his or her estate; ...
- (3) An appointment of a person as administrator under subsection (2)(f) has the same effect as if it had been made under Part 7 of the *Guardianship and Administration Act 1995*.”

To determine whether an instrument is effective, the Board applies the test in section 30 of the Act:

“30. (2) A deed or instrument is not effective to create an enduring power of attorney unless –

- (a) the donor understands the nature and effect of the deed or instrument; ...
- (3) For the purposes of subsection (2)(a), a donor is taken to understand the nature and effect of a deed or instrument only if he or she understands the following matters:
- (a) that the donor may, in the enduring power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
 - (b) when the power begins;
 - (c) that, once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
 - (d) that the donor may revoke the enduring power of attorney at any time when he or she has the mental capacity to do so;
 - (e) that the power the donor has given continues even if the donor subsequently loses his or her mental capacity;
 - (f) that the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity.”

When considering appointment of an administrator, the Board must address the criteria in sections 51 and 54 of the *Guardianship and Administration Act 1995*

51(1) If, after a hearing, the Board is satisfied that the person in respect of whom an application for an order appointing an administrator or an order appointing a guardian is made –

- (a) is a person with a disability; and

- (b) is unable by reason of the disability to make reasonable judgements in respect of matters relating to all or any part of his or her estate; and
 - (c) is in need of an administrator of his or her estate –
- the Board may make an order appointing an administrator of that person's estate.
- (2) In determining whether or not a person is in need of an administrator of his or her estate, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of the person's freedom of decision and action.
- (3) The Board must not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the proposed represented person.
- (4) Where the Board makes an order appointing an administrator of a person's estate, the order is to be that which is the least restrictive of that person's freedom of decision and action as is possible in the circumstances.
- (5) An order made under subsection (1)–
- (a) may be made subject to such conditions and restrictions as the Board thinks fit; and
 - (b) may be expressed to take effect when the represented person is aged 18 years.
- (6) The Board may exercise its powers under this section on an application under Part 4 of the *Powers of Attorney Act 2000*.

“54(1) The Board may appoint as an administrator of the estate of a proposed represented person –

- (a) The Public Trustee; or ...
 - (d) any other person, including the guardian of the proposed represented person, who consents to act as administrator if the Board is satisfied that –
 - (i) the person will act in the best interests of the proposed represented person; and
 - (ii) the person is not in a position where his or her interests conflict or may conflict with the interests of the proposed represented person; and
 - (iii) the person is a suitable person to act as the administrator of the estate of the proposed represented person; and
 - (iv) the person has sufficient expertise to administer the estate.
- (2) In determining whether a person is suitable to act as the administrator of the estate of a proposed represented person, the Board must take into account –
- (a) the wishes of the proposed represented person, so far as they can be ascertained; and

- (b) the compatibility of the person proposed as administrator with the proposed represented person and with his or her guardian, if any.”

Circumstances of execution of the instruments:

11. According to the evidence of FF, on 10th June 2005, she, HSBF and EIF attended at the offices of Hand Ogilvie and Breheny where solicitor, Don Keating, had prepared 4 instruments for execution. Each of the donors signed two instruments. The first two instruments appointed the two daughters, FF and TJC, as attorneys for their parents under an Enduring Power of Attorney. These instruments were later registered on 4 August 2005 (Registered Numbers PA10465 and PA 10466).
12. The second two instruments signed at the same time appointed all three children as attorneys for their parents under an Enduring Power of Attorney. These documents were later registered on 22 August 2005 (Registered Numbers PA11366 and PA11367). Mr Keating and a legal secretary, Maria Honeyman, witnessed each of the four instruments. It was not clear at the hearing whether revocations of the first instruments were also signed and subsequently registered.
13. The explanation given by the attorneys for this unusual procedure was that the donor’s intention was always to appoint all three children, but that EHF was in Canada at that time and was unable to sign his acceptance of appointment until mid-August. Because the active use of appointments may have been necessary before his return, a precautionary instrument was executed to cover the interim period before EHF was able to verify his acceptance of appointment.
14. The applications only relate to the later registered instruments, numbered PA11366 and PA11367, which appoint all three children as attorneys. It was common ground that these were the relevant and operative instruments, which were the subjects of the applications.

Subject of the Applications:

15. The attorneys had been operating the instruments in an enduring phase since approximately the 16th or 17th of August 2005, which was roughly the time that both donors were moved into B Hostel.
16. Both applicants stated that they found the operation of the powers to be unworkable because of significant differences of opinion between the attorneys about the management of particular assets within the donors' estates. One of the primary disputes related to sale of the family home to pay an Aged Care deposit. The applicants sought advice and direction as a means to break an impasse that had eventuated between the three attorneys.
17. The Division took the view that, because of the interaction between sections 35 and 33 of the Act, the question of whether the donors had the requisite mental capacity is a threshold question. That is: the Board must satisfy itself of the validity of the instrument before it can give competent advice and directions to the attorneys. Both applicants supplied with their applications medical information that caused the Board to embark upon further investigation of the validity of the instruments *vis a vis* the mental capacity of each of the donors. Thus, the level of mental capacity that each of the donors had on the date of execution, 10 June 2005, became the central question in the applications.

Mrs EIF – Capacity on 10 June 2005

18. A written opinion from Consultant Physician and Specialist in the Health of the Elderly, David Dunbabin, dated 24 May 2005 diagnoses EIF as suffering 'Severe anxiety disorder worsened by situational crisis.'
19. St Helen's Hospital records for the 10th June 2005 and the evidence of FF confirms that on the day that she signed the relevant instrument, EIF was an inpatient at St Helen's hospital, receiving treatment for anxiety and depression. Those records show that she was admitted on 1 June 2005 for symptoms of agitation and anxiety, which had possible delusional content. Between admission and discharge in August 2005 progress notes consistently record elevated levels of anxiety. The hospital's progress notes for 10 June 2005 state:

“20.00 Nursing: Patient remains anxious and agitated. Out with daughter & her husband this am for lunch & to see lawyers re signing over Power of Attorney to daughter. EIF continues to ruminate about her husband whom she claims is demented and about her failing eyesight. Attempted to redirect with TV and reading. Remains in room.”

20. The hospital’s progress notes for the following day show that she started the next morning less agitated but still distressed and worried about the future. She deteriorated during the morning and by evening the progress notes state:

“2040 Nursing: Mood and affect, anxious, agitated ++ this evening. Pt unable to sit still to watch TV or rest in room. Pacing corridor. Stated “wish I was better and back to my old self”.

21. An opinion, primarily regarding medication, by Consultant Psychiatrist Saxby Pridmore dated 22 June 2005 concludes that EIF has Agitated Depression, which he describes as ‘reasonably disabling’.
22. In a report dated 7 October 2005 for Hand Ogilvie and Breheny, Dr McArthur a Consultant-Liaison Psychiatrist, reported that on assessment EIF showed significant depression and anxiety, was impaired and not competent to manage her own affairs. He stated:

“The major area of impairment involves insight and judgement”

23. The Board wrote to Dr McArthur on 6 December 2005 requesting clarification of the onset and duration of that loss of capacity. He confirmed by letter dated 8 December 2005 that:

“I formed the view [in February 2005] that she had significant cognitive decline, especially involving the frontal lobes and manifesting as impaired judgment, impaired insight together with significant anxiety and depression. ...

There was no “sharp and significant loss of capacity” up until I last reviewed Mrs EIF on 30/9/05.

In summary I believe there was a gradual and progressive deterioration in her global mental state since February 2005.

There were multiple likely causes including brain damage due to the meningioma, and the original brain surgery and more recent cerebrovascular disease (both evident on the brain scans) plus anxiety

and depression which has appeared very treatment resistant. In addition to the stress of having a dementing husband and being removed from her long standing family home and having to stay in hospital until a Nursing Home placement was available must have been severe.”

24. At the hearing, EIF agreed that she had a condition named anxiety. She went on to say:

“MRS F: I’ve just simply been left this sort of sad horrible person and I was really uptight and rushing around and, you know, and now I’m just the opposite really. It just seems to have left me very blank.

MS SMITH: So on the day that you were in Don Keating’s office, where were you on the scale between being very uptight and rushing around and how you are now, you describe being a shadow of a person left blank, where - which of those extremes would you have been closest to when you were in Don Keating’s office that day

MRS F: Oh, I was more on the high side of things, I think, yeah.

MS SMITH: Did you feel like you could ask Don questions about - and get advice about signing this document before you signed it?

MRS F: Yes.

MS SMITH: Okay, so did you ask some questions?

MRS F: Well we didn’t really get advice from him except he did say that if they went up, our finances - any of the money went threes - we tried to have three powers of attorney and not sensible apparently and I thought I would like TJC, as she’s here, but she - and that’s how it was but EHF seems to have big problems with her.

MS SMITH: Do you mean that you would like to have TJC now or do you mean that even back in August you wanted TJC?

MRS F: Yeah, and we thought perhaps if it’s two different - EHF perhaps, FF would take it on.”

25. FF confirmed that EIF appeared highly agitated on the 10th June 2005. TJC and FF gave evidence that it had been EIF’s wish to execute a power of attorney for some weeks before it was executed. If anything, she was insistent that it should be done. However, one of her primary concerns and motivators for signing the document was her husband’s condition. At the hearing she appeared to have believed that the powers would not be fully implemented:

“MS SMITH: ... But did you feel like you understood it - did you feel, when you signed the document did you feel relaxed and confident that this was a document that you understood?

MRS F: Yeah, well no, I just think I thought that this is something we should be doing.

...

MS SMITH: ...Now you've said that you know that you were giving power to the three children to make decisions?

MRS F: Yes.

MS SMITH: What did you understand they could do with that power?

MRS F: Well I understood and they really could just take everything over if they - and of course, I think they said that they would never do that if that had charge, it wouldn't be hard to be - scrimp for any reason, anything they've had to spend for us they've - they've noted to the part of the - apart from any spending themselves.

MS SMITH: Okay, you're quite right, they've been very clear about keeping your estate separate from their own.

MRS F: Yes.

MS SMITH: And that's in fact where part of the dispute has come from. When you signed it, did you, for instance, know that they might sell your house?

MRS F: Well I suppose I knew but - that such a thing wouldn't happen.

MS SMITH: Mm, it's a complicated transaction, isn't it?

MRS F: Yeah.

MS SMITH: ... So you understood that they could make the decision about whether to sell the house or whether to sell the land at the Gardens

MRS F: Yes.

MS SMITH: - or whether they rent out the house, you understood that they could make all those decisions?

MRS F: Yes, I suppose I did, but I didn't even think of it, so -

MS SMITH: Because you didn't think it would happen or?

MRS F: Yeah, that's right.

26. While she possibly had a general understanding that she and her husband had a number of outstanding financial issues that required management, the Board considered it likely that she entered into the power of attorney as a means of encouraging her husband to sort out his affairs. Significantly the records show that in the days leading up to and following the execution of the document she wavered between being agitated and highly agitated. The Board considered that she entered into this document to find a fix for the agitation and anxiety that she felt, rather than understanding that this is a document where she was assigning full power, allowing someone else to sell her home. There is no suggestion that she was coerced into it, in fact with her levels of agitation and anxiety, she

probably coerced other people into doing things that they might have otherwise taken a step back and reviewed.

27. Further the Board was not satisfied that EIF had clearly understood each of the elements in subsection 30(3) (a),(b),(c),(d) and (f) of the *Powers of Attorney Act 2000*.
28. In light of all of these issues, the Board concluded that EIF did not have capacity on 10 June 2005 to execute the instrument because she did not understand the nature and effect of the instrument.
29. Accordingly, the Board was satisfied that the power does not comply with section 30(2)(a) of the Act and declared pursuant to section 33(2)(e)(i) of the *Powers of Attorney Act 2000* that the power PA11367 is invalid.

Professor HSBF – Capacity on 10 June 2005

30. A report by Consultant Physician and Specialist in the Health of the Elderly, David Dunbabin in relation to HSBF, dated 29 September 2005 accompanied the applications. In that report Dr Dunbabin states that HSBF:

“ ... presents with a moderately severe dementia, probably of Alzheimer type. Due to his superior intellect and organisational skills he presents in a favourable light on more casual assessment. ... I believe that due to these deficits HSBF would be vulnerable to suggestion and may not fully appreciate the extent and import of relatively complicated financial instruments.”

31. An earlier report dated 23 May 2005, also from Dr Dunbabin states that:

“His mini mental score today was 24 out of 30 with fairly major holes in his orientation and short term recall.”
32. A report by the Aged Care Assessment Team (ACAT) dated 5 August 2005 indicates Alzheimer’s Disease as the health condition that has the greatest impact on HSBF’s need for assistance.
33. In a further report on the Board’s standard Health Care Professional Report form dated 24 October 2005, Dr Dunbabin stated that the disability, involving poor

short-term memory, neglect of self-care and loss of insight and judgment had been evident for approximately one year.

34. The reports about EIF's behaviour reveal that she has had major concerns about HSBF's loss of skills since her admission to hospital in June 2005 and possibly before. At the hearing, the attorneys were in agreement that HSBF's level of cognitive loss was greater than EIF's.
35. At the hearing, HSBF demonstrated a comprehensive loss of understanding about the instrument and about the management of his financial affairs. He displayed great character, was humorous and apparently unconcerned about the significant gaps in his memory. As Dr Dunbabin stated in his report, a casual assessment would not reveal the level of HSBF's impairment.
36. It is clear that HSBF has experienced a steady and significant decline in mental capacity in the 12 months between October 2004 and October 2005. It is likely, based on all of the above reports, that on 10 June 2005, his dementia was quite progressed.
37. The Board is satisfied that HSBF did not on 10 June 2005 have capacity to execute the instrument because he did not understand the nature and effect of the instrument.
38. Accordingly, the Board was satisfied that the power does not comply with section 30(2)(a) of the Act and declared pursuant to section 33(2)(e)(i) of the *Powers of Attorney Act 2000* that the power PA11366 is invalid.

Section 51 GAA - Appointment of an Administrator:

39. Having determined pursuant to the *Powers of Attorney Act 2000* that neither donors had capacity to execute Enduring Powers of Attorney, the Board is then directed to the provisions of the *Guardianship and Administration Act 1995* for the determinations about the appointment of an administrator. In light of evidence received in the applications to review the Enduring Powers of Attorney, the Board was satisfied that both HSBF and EIF were persons with a

disability and that they lacked the capacity to make reasonable judgments in respect of their estates.

40. The Board noted that a number of decisions about the future of the joint estates of HSBF and EIF are outstanding. There is a deposit owing for Aged Care for \$200,000.00 each and to fund this it is most likely that their home requires sale.
41. The Board was satisfied on the basis of medical reports noted above and each of the applications in relation to HSBF and EIF that the conditions set out in section 51 of the *Guardianship and Administration Act 1995* for the appointment of an administrator have been met.

Section 54 - Persons eligible as administrators

42. Aside from the possibility of an appointment pursuant to section 54(1)(a) of the Public Trustee, TJC nominated the appointment of her sister, FF as administrator.
43. Importantly, FF did not immediately accept the nomination from her sister. She asked the Board a number of detailed and perceptive questions about the role of an administrator and alerted the Board to a competing commitment that she has in the next few months to write a book. She then asked for some time to discuss her role in private with her brother and sister. This adjournment followed on from some discussions with the representative from the Public Trustee prior to the hearing about their services and a period of attempted mediation in the weeks leading up to the hearing.
44. After a careful deliberation, FF consented to appointment as administrator for each of her parents. No other person was nominated or consented to appointment. Given the level of conflict that had arisen when three siblings had formerly managed their parent's finances, the Board initially had reservations about whether selecting one of those siblings for appointment as administrator would be in the best interests of HSBF and EIF.

45. Because of her very careful assessment of the role and her authoritative stance with her siblings (to the effect that she would only accept the role if both of her siblings were committed to supporting her) FF impressed the Board as a person who would not make reckless decisions and who would exercise authority fairly.
46. The Board gave some consideration to whether there was a potential for a conflict of interests, for the purposes of section 54(1)(d)(ii) of the Act, in managing the two parent's estates, but was satisfied that the benefit of continuing to manage the two estates as a joint estate outweighed any individual benefit of splitting the estates and managing them separately.
47. For the purposes of section 54(1)(d)(iii) and 54(2) of the Act, the Board was satisfied that FF is sufficiently compatible with both of her parents and with her siblings. EIF clearly stated to the Board that she wished for FF to manage the finances, given that EHF and TJC could no longer agree. It was also clear that EIF desired that management of her finances stay within the family, even if that meant that the family conflict might be protracted. The Board could not discern HSBF's wishes, because he believed that he was still managing his finances independently.
48. The joint estate involves two properties, some cash and stock assets and \$400,000.00 liability to B Hostel for the accommodation bond. In the disputes that brought the family before the Board, two particular issues had been inflammatory. The first was whether the family home should be sold to pay the accommodation bond. The second was the uncertain status of a payment that HSBF made to EHF to the value of \$34,000.00 as either a gift or a loan. Upon questioning by the Board about both issues, FF showed that she was relatively objective and sensitive to the needs of her parents and siblings.
49. FF [*details of FF's position removed for de-identification purposes*]. In that position, she manages various budgets to a total value of \$15,000,000.00. Given the level of professional responsibility and experience that she has and the objective approach to seeking appointment, the Board was amply satisfied that FF had the requisite expertise to manage the estates from interstate and to

