

Guardianship and Administration Board
Hobart

HHD, on the application of NMD

GAB No. XXXX of 2005

REASONS FOR DECISION

ANITA SMITH (President)

Hearing: 21 July 2005

Review of enduring powers of attorney – three sons appointed as attorneys for mother with dementia, one deceased, one a non-paying tenant in donor’s property, with pecuniary interest, conflict of interest - appointment of an administrator in Victoria – instrument revoked
Powers of Attorney Act 2000 (Tas) ss 33, 35

1. This is an application under section 33 of the *Powers of Attorney Act 2000* for a review of an enduring power of attorney made by HHD of the Aged Care Facility, in Victoria appointing her sons, NMD, BHD and ESD as her enduring attorneys.
2. The proposed represented person is in full time aged care at the Aged Care Facility and has dementia which occasions short term memory loss. She is a widow and is survived by two of her sons, NMD and BHD. Because she owns a property in Tasmania, the Board has jurisdiction in relation to the operation of her enduring power of attorney.

Other Proceedings:

3. Prior to receipt of the application for review pursuant to section 33 of the *Powers of Attorney Act 2000*, the Board received an application to register an interstate order also for HHD made by the Victorian Civil and Administrative Tribunal (VCAT) on 30 November 2004. The order made on 16 December 2004 as a result of that application reads:

“UPON an application by NMD of Victoria and ESD of Victoria in respect of HHD (hereinafter called the ‘represented person’)

AND upon the Board being satisfied that NMD and ESD have been appointed joint administrators of the represented person under the provisions of the Guardianship and Administration Act 1986 (Victoria) which is declared corresponding law for the purposes of Section 81 of the Guardianship and Administration Act 1995 (Tasmania), (hereinafter called 'the Act'), and

AND upon a certified copy of the Order appointing NMD and ESD as administrators of the represented person having been furnished to the Board,

THE BOARD ORDERS

- 1. That the certified copy of the Order be registered as an order under the Act.*
- 2. That NMD and ESD are taken to be the administrators of the estate of the represented person for the purposes of the Act.*
- 3. That the powers and duties of the administrator be those conferred by Division 4 of Part 7 of the Act.”*
4. This order was varied when a subsequent order from VCAT dated 14 June 2005 was registered in Tasmania on 8 July 2005, which appointed NMD as sole administrator following ESD's death.
5. Such applications for registration of an interstate order are administrative processes, subject only to the requirements of section 81 of the Act. However, the Board was not aware at that stage that there was also an enduring power of attorney in force. The Board was inadvertently therefore in an invidious position because of the existence of an enduring power of attorney and an administration order contrary to the principles in section 53 of the *Guardianship and Administration Act 1995*.

Process of the Application:

2. The Board received the application from NMD to review the enduring power of attorney on 11 July 2005. He states in the application that the power is no longer necessary because of the VCAT order, which had subsequently been recognised by the Board.

3. An extensive medical report by Dr Q, Consultant Psychiatrist confirmed that HHD has Alzheimer's disease and no longer has capacity to make reasonable financial judgments.
4. On 8 July 2005 the applicant, HHD and BHD were given notice of the hearing listed for 21 July 2005 that detailed the range of orders available under section 33(2) of the *Powers of Attorney Act 2000*.
5. On 12 July 2005 the applicant sent to the Board a letter explaining that HHD's primary asset in Tasmania was the house where BHD lives. That house was purchased from the Housing Department under a lease payment arrangement upon which approximately \$6000 remains owing. The applicant also provided copies of correspondence to VCAT regarding the attempts to have BHD either pay rental or vacate the premises.
6. This correspondence to VCAT also notes that the premises are in a poor state of repair and that BHD's residence there imposes a number of risks to the value of the property. The correspondence also noted BHD's failed attempts at restraint orders against the applicant and a failed appeal from the dismissal of the restraint order. These legal processes are linked in the applicant's documents with BHD's mental illness.
7. On 19 July 2005 the Senior Investigation and Liaison Officer of the Board noted that the home was in a poor state of repair, that BHD had asserted that despite the VCAT orders the enduring power of attorney was still valid. She also noted that he has a mental illness.
8. The Board received a letter dated 20 July 2005 from BHD by facsimile requesting an adjournment. The letter also alleges criminal activity undertaken under the guise of the enduring power of attorney and criminal actions against him. The main reason he sought an adjournment was because of a range of other legal processes, including through VCAT, Victorian Police, the Federal Magistrate's Court and the Human Rights and Equal Opportunity Commission.

9. BHD subsequently did not attend the hearing at the appointed time. The Board telephoned him from the hearing and indicated that he could attend by telephone. He reiterated his reasons for requesting an adjournment and the Board indicated that these did not constitute valid reasons for an adjournment.
10. The hearing proceeded with BHD by telephone and NMD present in the hearing room. However, BHD hung up the phone part way through the hearing and was uncontactable thereafter. While he was still in contact BHD was questioned about living rent-free in his mother's house and his proposals regarding that situation but he gave no meaningful response.

Findings:

11. Because of his position as attorney and the donor's son, the Board found pursuant to section 33(1)(d) of the Act that NMD was a person with a proper interest in the matter for the purposes of bringing an application to the Board.
12. Upon the evidence of Dr Q, the Board found that HHD had lost capacity to make reasonable financial judgments around 2002 and has been continuously incapable of making reasonable financial judgments because of her short-term memory loss since that time.
13. The Board heard evidence that NMD and ESD had been the only active attorneys and that BHD had never exercised his powers as an attorney over any part of HHD's estate. The Board found on the basis of evidence given by the applicant that BHD's actions have devalued the house and his failure to pay a reasonable rental have cost the estate money.
14. Given that BHD is a non-paying tenant in the donor's property, he is in a position where his potential responsibilities as an attorney conflict with the benefit he derives from free accommodation. To that extent he is not an appropriate attorney.

15. Based upon verbal evidence by the applicant, the Board found also that the donor's wishes are most likely to have allowed BHD to remain in the property so long as the value of that property was retained and that the estate did not lose money. However the donor's wishes are no longer ascertainable due to her level of incapacity.
16. Of the three attorneys, only two had ever been actively engaged in that role. With the sad passing of ESD, only NMD remained an active attorney acting in accordance with fiduciary duties in his mother's best interests. His wishes were for the power to be revoked in favour of administration responsibilities. BHD wished for the power to remain in force so that his accommodation would not be disturbed. BHD did not advance any reasons for the retention of the power that related to the donor's best interests.
17. In the circumstances, the Board determined that it was in the best interests of the donor to revoke the power of attorney for the following reasons:
 - (i) The irregularity of the registration of two VCAT orders appointing the applicant as administrator in conflict with the existing power.
 - (ii) That the attorney seeking the retention of the power had never exercised any powers.
 - (iii) That the attorney seeking retention of the power had a direct conflict of interest in that he was in receipt of a direct pecuniary benefit, being free accommodation, from the estate.

Orders:

Accordingly the Board made the following orders:

1. That the power is revoked from the date of this order.
2. That the order of the Board dated 8 July 2005 registering the order made by the Victorian Civil and Administrative Tribunal dated 14

June 2005 appointing NMD as administrator for the donor is confirmed.

Anita Smith
PRESIDENT

24 August 2005