

GUARDIANSHIP AND ADMINISTRATION BOARD  
HOBART

**OWK upon an application for administration**

GAB No. 1045

**REASONS FOR DECISION**

Anita Smith – President  
Kim Barker – Member  
Elizabeth Dalglish - Member

7 November 2003

Administration – suitability of daughter as proposed administrator - reasonable degree of business acumen required – history of dealings with Trustees including attempt to appoint as attorney  
*Guardianship and Administration Act 1995 (Tas), ss 6, 51, 54*

1. Pursuant to section 50 of the *Guardianship and Administration Act 1995* (“the Act”) the applicant has applied to the Guardianship and Administration Board (“the Board”) to be appointed as the administrator for her mother, OWK. Mrs K is an 84-year-old woman who has brain damage arising from a stroke and dementia..
2. The application was lodged with the Board on 3 October 2003. The application was heard on 7 November 2003 following some standard investigations by Board staff. The applicant attended the hearing, as did Mr W from Tasmanian Perpetual Trustees, the Senior Investigation and Liaison Officer and the Registrar of the Board.
3. A report by Dr N of Hobart confirmed that Mrs K has lost capacity to make decisions and is no longer reliably capable of operating a bank account, paying bills, managing her money or budgeting. Mrs K has stated that she is still capable of all of these tasks and that when she is no longer capable, she will execute a power of attorney. The Board accepted statements from the applicant, the Board’s Senior Investigation and Liaison Officer (SILO) and the medical evidence of Dr N in favour of the statements of Mrs K regarding her present level of capacity.

4. The hearing proceeded on the basis that there was no dispute between the parties, other than the proposed represented person, that the factors in section 51(1) had all been made out. Deliberation at the hearing centred upon the factors outlined in section 54 of the Act as to the appointment of the most appropriate administrator.

### ***The history of the application***

5. On 17 November 2000, the Board received an earlier application regarding Mrs K, from the same applicant. At that stage, the applicant alleged that her mother had become confused in financial matters; she was having difficulties in some dealings with Centrelink and was gambling in a reckless and irresponsible manner. The SILO and the Public Guardian reported at that time that Mrs K did not want her daughter to manage her affairs. Neither of those officers was satisfied, at that stage, that Mrs K suffered any incapacity in her managing her estate. The application was withdrawn in favour of Mrs K's stated intention of executing an Enduring Power of Attorney appointing Perpetual Trustees, as they were then known. The reports of the SILO and the Public Guardian from the earlier application were available to the Board at the hearing.
6. The Board was informed that Mrs K proceeded to execute what she believed to be a valid Enduring Power of Attorney (EPA) appointing Perpetual Trustees. However, the document was one of a number issued by the trustee company at the time that cited the previous enabling legislation, not the current enactment of the day. Mr W told the Board that the Recorder of Titles had advised Perpetual Trustees that she would refuse registration of such EPA's. Accordingly the trustee company recalled a number of EPA's from clients, including Mrs K, and sent new amended documents for their execution. Mrs K had, therefore, executed a document that could not be registered as an EPA, but had not executed the amended document and therefore does not have a valid EPA.

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### *The Estate*

7. Mrs K has a substantial estate. The application indicates that she has savings and investments of approximately \$650,000.00. The applicant estimated that the real estate has a value of \$700,000.00. The estate also includes a prestige motorcar, antique furniture and dolls, shares and debenture stock which were unvalued in the application but evidence in the hearing suggested they might add a further \$60,000.00 to \$100,000.00 to the value of the estate.

### *Section 51(2) and (3)*

8. The Board was presented with two realistic alternatives: appointment of the applicant or Tasmanian Perpetual Trustees as administrator. No less restrictive option would have been capable of protecting the estate, investing to best advantage and meeting Mrs K's day-to-day needs. For the purposes of section 51(2) the Board considered that the appointment of an appropriate administrator would be the best means of promoting Mrs K's freedom of decision and action.
9. The Board determined that, given the size of the estate, not only was an administrator required, but also such administrator required a reasonable degree of business acumen so as to represent the best interests of the represented person and her estate.
10. Mrs K has a will held by Tasmanian Perpetual Trustees that was sited by the Board. The will makes such provision as would require an administrator to have an awareness of the testator's intention for certain items of property. Mrs K's intentions for the ultimate disposal of the estate are an important consideration in

determining her best interests. To the Board's knowledge, the applicant does not know the contents of the will.

***Section 54(1)***

11. The Tasmanian Perpetual Trustees are a trustee company for the purposes of section 54(1)(c). The Board's consideration of the factors in section 54(1)(d) and section 54(2) therefore relate only to the possibility of appointment of the applicant as administrator.
12. The applicant has consented to act as administrator. The Board heard evidence from the applicant that she would proceed to deal with the estate in a manner that reflected her knowledge of her mother's particular wishes and preferences. She indicated that some funds in bank accounts could be better invested and that some minor improvements to the house would substantially increase its value. She stated that she would wait 3 months to monitor her mother's condition before making a decision to sell the house. These statements demonstrated that the applicant had carefully considered her potential role as administrator and had every intention of acting in her mother's best interests.
13. An area of possible conflict of interest for the purposes of section 54(1)(d)(ii) is the potential conflict between the applicant's position as a possible beneficiary to the estate and as the administrator. Nothing in the applicant's demeanour suggested that such a conflict would actively undermine her role as an administrator. The applicant is also currently a tenant in her mother's home, but is not paying rent. Specific directions (for example to set a commercial rate of rental) in any orders of the Board could rectify such potential conflict arising from the tenancy should the applicant be appointed as administrator.
14. The applicant provided evidence that she had been a real estate agent in Queensland and New South Wales. She had bought and renovated properties in Melbourne and

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Brisbane. She had also been an interior design consultant in Melbourne, Brisbane and Noosa. Such experience is relevant to section 54(1)(d)(iv), however the Board considered it likely that, should the applicant be granted administration, her lack of particular experience in investment would be a detriment.

15. The applicant addressed this detriment in the application stating “I would seek appropriate advice and help, after examination of the duties.” In the hearing, the applicant stated that Mr H and Ms R, an account and solicitor with X Solicitors, had agreed to provide assistance with the accounts. The applicant’s view was that while it is a large estate, the management responsibility is relatively simple. Mr W concurred.
16. The Board took the view that the applicant could competently undertake the tasks of an administrator. Although the size of the estate may cause the Board concerns in appointing a private administrator without formal qualifications, an order could contain directions to seek appropriate professional advice. Had the applicant satisfied the tests in section 54(2), the Board might have questioned why financial advice was being sought from a law firm and pursued further evidence about the qualifications of the nominated advisors to give financial advice.

***Section 54(2)***

17. Section 54(2)(a) requires examination of Mrs K’s wishes. Given that she rejected the notion of incapacity, Mrs K’s present wishes are to remain in control of her own financial affairs. The Board had evidence that Mrs K has little or no insight into the level of her dementia and that her stated wishes reflect that lack of insight. The Board had access to statements about Mrs K’s personality prior to her disability which showed she was an intelligent woman who had fixed opinions, argued strongly and competently and was never easily dissuaded from a course she had set her mind to. Experienced medical and legal practitioners who had dealings with

Mrs K held her in great admiration. Even with the progression of the disability, she displays consistent personality traits.

18. The Board noted that Mrs K's execution of an ostensibly valid EPA appointing the Perpetual Trustees showed some earlier intention upon her part, at a time when she retained capacity to make such decisions, to appoint professional trustees to manage her affairs. The Board noted that Mrs K received a fresh EPA document capable of valid execution but failed to sign it despite subtle requests. The SILO's report dated 3 November 2003 stated:

“Mrs K decided to execute a power of attorney with Tasmanian Perpetual Trustees and one was prepared but she never signed same. However she maintained close contact with Mr W of that office advising him of her activities. She was adamant throughout this time that she did not need a power of attorney yet. In fact when I visited her on 29<sup>th</sup> October she was still adamant that Mr W need not help her yet and that she would not sign the document until she was allowed to return home and check out her motorcar etc.”

19. The Board heard evidence from the applicant and Mr W that Mrs K began to distrust the applicant when the applicant did not support Mrs K's application to renew her driver's licence in 2000. While there was medical evidence that the licence should not be issued, Mrs K blamed her daughter's intervention and deeply resented the loss of independence that ensued. This resentment fed into Mrs K's later suspicions about the applicant that may have been fuelled by the developing disability rather than issues of substance. However, the extent of that dispute is reflected in the fact that Mr W was clearly aware of it.
20. Mrs K undertook a range of financial transactions after that incident. These included the sale of a unit in Queensland in 2002 and seeking advice about

investment of monies in term deposits between July and October 2002. Mrs K had numerous discussions with Mr W during that period.

21. By contrast, the applicant reported at the hearing that Mrs K had offered the unit to her and informed her of the sale, but did not consult her for advice, despite the applicant's previous experience as a real estate agent. It appears that Mrs K has exercised a reasonably high degree of privacy in her financial dealings, allowing her family to benefit from her investments and transactions, but not to take part in them.
22. The relationship between Mrs K and Tasmanian Perpetual Trustees commenced in 1985 but intensified upon the death of her second husband. Prior to that time, Mrs K had left all financial management of the estate to her husband. Upon his death twelve years ago, the trustees acted as executors and she retained a financial advice relationship with them for subsequent financial dealings. Mrs K generally sought a range of professional opinions and invested conservatively, but Tasmanian Perpetual Trustees had provided a reference point for a number of her major independent financial dealings. She retained them to draft at least 7 wills during the professional relationship.
23. Taking into account the intention to create an enduring power of attorney, a degree of privacy exercised by Mrs K in her financial dealings and a demonstrated reliance upon professional financial advisers, the Board considered that so far as Mrs K's wishes could be ascertained they showed a preference for the financial advice of qualified professionals and, in particular, the advice of Tasmanian Perpetual Trustees.
24. Section 54(2)(b) requires the Board to take into account issues of compatibility between the proposed represented person and the administrator. Taking into account the reports by the Public Guardian and the SILO of Mrs K's attitude to the 2000 application and the impact upon the relationship between mother and daughter

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occasioned by the loss of a driver's licence, the Board believed there to be greater compatibility, so far as financial matters were concerned, between Mrs K and the trustees than between Mrs K and the applicant.

25. The Board also took into account the duty of an administrator pursuant to section 57(2)(b) to consult with the represented person. Additionally, during the hearing Mr W assured the Board that Tasmanian Perpetual Trustees would consult the applicant in the execution of their duties as administrator of her mother's estate, allowing her to lend her expertise in matters such as the presentation of the property and ascertainment of her mother's historical preferences.
26. While the applicant satisfied the Board that (subject to some minor conditions being imposed) she would have been a competent administrator, for the reasons stated above, the Board is of the opinion that appointment of the applicant would not satisfy the criteria established in section 54(2) and therefore, the applicant is not a suitable person to act as the administrator of the estate for the purposes of section 54(1)(d)(iii). The application for appointment of the applicant therefore fails in favour of the appointment of Tasmanian Perpetual Trustees as administrator.

## **THE BOARD ORDERS**

1. That Tasmanian Perpetual Trustees be appointed as administrator of the estate of the represented person.
2. That the powers and duties of the administrator be those conferred by Division 4 of Part 7 of the *Guardianship and Administration Act 1995*.
3. That the order remains in effect until 6 November 2006.

**Anita Smith**  
**President**

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