



SAT

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Administrative
Tribunal

Western Australia

Guardianship and Administration Act 1990

DECISIONS BULLETIN

No 4 December 2006

This Bulletin contains summaries of written reasons published by the Tribunal in December 2006. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au

IL [2006] WASAT 357

7 DECEMBER 2006

**MS F CHILD (MEMBER), DR E LEIPOLDT (SENIOR SESSIONAL MEMBER), MS
R CARROLL (SENIOR SESSIONAL MEMBER)**

Guardianship and administration - Remuneration of the administrator - Past unauthorised remuneration - Rate of future remuneration - Expenses

On review of an administration order the Tribunal confirmed the appointment of Perpetual Trustees Australia Limited, a trustee company, as administrator for an elderly woman suffering from dementia. The company had first been appointed as administrator in 2001 by the Guardianship and Administration Board.

Due to the size and complexity of the estate under administration, the Tribunal ordered that future remuneration of the administrator be at the usual rate charged by the company for this size estate. As the order under review had not expressly provided for remuneration of the administrator, the Tribunal's order regularised the remuneration of the administrator under the *Guardianship and Administration Act 1990* which requires express authority for remuneration.

The Tribunal also considered the past charges applied to the estate since 2001. It found that the administrator had acted in good faith and in the mistaken belief it was entitled to be paid remuneration for administration of the estate. Most importantly, as the work had been done and the represented person had benefited from the administration of the estate, it was appropriate that remuneration be authorised for this period.

The Tribunal ordered remuneration for the period 3 April 2001 to 7 December 2006 equal to an amount which would have been charged had the remuneration been authorised and fixed at the rate charged by the administrator on the estate at the time of appointment. Thereafter the administrator was authorised to charge its published rate of fees for that size estate.

The review of the order in this case raised the same issues of principle as two other matters before the Tribunal, namely GAA 421/2006 and GAA 410/2006. All three cases were heard together and decisions reserved in each.¹

A and J [2006] WASAT 359

7 DECEMBER 2006

MS J TOOHEY (SENIOR MEMBER), MS D DEAN (MEMBER) MR J JAMES (SENIOR SESSIONAL MEMBER)

Administration - Guardianship - Enduring Power of Attorney - Cross applications by family members for appointment of guardian and administrator for elderly man - Allegations of financial abuse - Family conflict - Need for independent administrator - Public Trustee appointed - No need for guardian to consent to medical treatment - Wife had authority under s 119(3) - Related applications concerning wife dismissed

The Tribunal heard cross-applications by family members for the appointment of a guardian and administrator for J, and for the appointment of an administrator for his wife, A. The applications were made against a background of intense conflict between J and A's adult children, and between some of the children and A.

There was no dispute that J was unable to make any decisions for himself. Although he had previously made P, his step-grandson, the donee of an enduring power of attorney, P was unable to act effectively as donee because of the conflict within the family. The Tribunal found J was in need of an independent administrator. It revoked the enduring power of attorney and appointed the Public Trustee administrator for J.

The guardianship application in respect of J sought the appointment of a guardian to make decisions concerning his medical treatment. However, as s 119(3) of the *Guardianship and Administration Act 1990* conferred authority on A, as J's spouse, to make decisions concerning his medical treatment, there was no need for a guardian to be appointed for that purpose. There being no other need, the application for the appointment of a guardian for J was dismissed.

The Tribunal was satisfied that A was capable of making decisions on her own behalf and dismissed the application made in respect of her.

DW and JM [2006] WASAT 366

15 DECEMBER 2006

MR J MANSVELD (MEMBER)

Guardianship - Administration - Enduring power of attorney - Fiduciary duties - Obligations of an attorney - Gifting by an attorney under an enduring power of attorney - Attorney seeking directions

A daughter of an elderly woman had been appointed her attorney under an enduring power of attorney.

¹ Summaries of **AG** [2007] WASAT 7 will be in the January bulletin and **CD** [2006] WASAT 372 is at page 5 of this bulletin

The daughter as attorney proposed that she gift from her mother's estate a sum of money to the woman's other children and the children of a deceased son of the donor. The attorney was not intending to benefit from the gift herself.

The daughter was concerned that as attorney she did not have the authority to make the gifts and sought directions from the Tribunal.

The elderly woman suffered from dementia and was a resident in a nursing home. She was bed bound. Her care needs were entirely met by the nursing home and after all necessary expenditure was incurred she retained an annual surplus that was suggested as the proposed gift. Her estate was made up of cash and a share portfolio and was valued at nearly \$200 000.

As attorney, the daughter had a fiduciary duty to her mother. The enduring power of attorney established an agency between the mother as principal and daughter as attorney. The daughter was bound to avoid conflicts of interests and not profit from her position.

The Tribunal decided that the legislation and case law which applied to administrators appointed by the Tribunal when gifting was proposed, was useful as a guide to attorneys in their decisions about gifting.

The Tribunal decided that in general it was not appropriate for attorneys to be directed about gifting and in this case came to a view that the elderly woman's estate was not in need of protection. The application was therefore dismissed.

TC [2006] WASAT 369

15 DECEMBER 2006

MS F CHILD (MEMBER), MR J MANSVELD (MEMBER), MR J JAMES (SENIOR SESSIONAL MEMBER)

Guardianship and administration - Administration - Review of administration order - Remuneration of administrator

On review of an administration order appointing Perpetual Trustees as administrator for the estate of a young man with acquired brain injury, the Tribunal confirmed the appointment and made an order for remuneration from the estate of the represented person.

The Public Trustee had sought review of the order, as the examination of the accounts submitted to the Public Trustee by the administrator had revealed that the estate had been charged fees that were not consistent with an order made for remuneration of the administrator.

By the time the matter had come on for hearing the administrator conceded that an error had been made in the calculation of fees and had agreed to reimburse the estate for the fees overcharged.

The administrator sought an adjustment to the remuneration charged as the "Additional Service charge" from that which had been proposed and accepted on their appointment in March 2005 to the published rate applicable at the time which was a higher figure.

The Tribunal decided that the remuneration by way of the commission in respect of the capital, the management fee, which was the negotiated fee should be fixed at the rate proposed and charged by the administrator from appointment in March 2005 but that the

wording of original order appeared to contemplate a move in the Additional Service charge and so that the administrator was authorised to charge its published fee for that part of the remuneration from the date of the new order.

RC and LP and AC [2006] WASAT 370

18 DECEMBER 2006

MS D DEAN (MEMBER), MR J MANSVELD (MEMBER), DR G HAMILTON (SENIOR SESSIONAL MEMBER)

Application for administration - Capacity to make reasonable decisions - Family conflict - Enduring power of attorney revoked - Need for an administrator - Public Trustee appointed administrator

The applicants, RC and LP, son and daughter of AC, sought the appointment of an administrator for their father, AC, because of concerns that he had recently changed his will leaving the family home to his other son, KC, and daughter-in-law, NC. This would effectively leave AC's disabled daughter with little or no funds for her future care. In the past, AC's wills had always made significant provision for his disabled daughter.

A further concern was the fact that AC had recently revoked an enduring power of attorney in which he appointed RC and KC as donees. AC subsequently executed an enduring power of attorney appointing KC as sole donee. KC had been operating the enduring power of attorney and making decisions which the applicants believed were not in their father's best interests. The applicants said that the enduring power of attorney was not workable because of the level of conflict and lack of communication between them and their brother, KC, who, they said, did not include them in any of the major financial decisions in respect of their father, AC.

The matter was heard over three hearings, being adjourned the second time to allow additional clarifying information about AC's capacity to be sought. At the third hearing, and with the benefit of capacity reports from two geriatricians, it was agreed by all parties that AC did not have the capacity to make reasonable judgments about matters relating to his estate.

Evidence was provided at the hearings that AC had a history of overspending his Centrelink income by approximately \$150 per fortnight. KC, who by his own account had been managing his father's financial affairs for some years, had not put in place any strategies to manage this problem. The siblings decided to take out a reverse mortgage on the family home to repay AC's debts and to ensure that he had adequate funds to last him several years. Within a relatively short time these funds were exhausted. The Tribunal found that the expenditure of these funds had not been managed in a manner consistent with AC's best interests.

Before the Tribunal reconvened for the third hearing, without consultation with the other siblings or the Tribunal, who had requested and been given an assurance by KC that he would not use the enduring power of attorney for anything other than minor day to day financial transactions, KC increased the reverse mortgage to pay further debts he said had been incurred by AC.

The Tribunal found that the enduring power of attorney was not operating in AC's best interests and, given that he was not able to make reasonable judgments for himself that he was in need of an administrator of his estate. There was no one suitable to act in this role

other than the Public Trustee. The Tribunal revoked the enduring power of attorney and appointed the Public Trustee administrator of AC's estate.

CD [2006] WASAT 372

20 DECEMBER 2006

MS F CHILD (MEMBER), DR E LEIPOLDT (SENIOR SESSIONAL MEMBER), MS R CARROLL (SENIOR SESSIONAL MEMBER)

Guardianship and administration- Remuneration of the Administrator - Past unauthorised remuneration - Rate of future remuneration - Expenses

On review of an administration order, the Tribunal confirmed the appointment of Perpetual Trustees WA Limited, a trustee company, as administrator for a man suffering the effects of brain damage as a result of a motor vehicle accident in 1988. The company had first been appointed as administrator of his estate in 1995 by the Guardianship and Administration Board.

The Tribunal considered that the estate under administration was of sufficient size and complexity to warrant remuneration, and the Tribunal ordered that future remuneration of the administrator be at the usual rate charged by the company for this size estate.

As the order under review had not expressly provided for remuneration of the administrator, the Tribunal's order regularised the remuneration of the administrator under the *Guardianship and Administration Act 1990* which requires express authority for remuneration.

The Tribunal also considered the past charges applied to the estate since 1995. It found that the administrator had acted in good faith and in the mistaken belief it was entitled to be paid remuneration for administration of the estate. Most importantly, as the work had been done and the represented person had benefited from the administration of the estate, it was appropriate that remuneration be authorised for this period.

The Tribunal ordered remuneration for the period 3 March 1995 equal to an amount which would have been charged had the remuneration been authorised and fixed at the rate agreed and charged by the administrator on the estate at the time of appointment until the order was reviewed in 2000. For the period from 2000 until the review of that order in 2006, the administrator was authorised to charge the level of fees as disclosed in documents put before the Board in 2000. Thereafter, the administrator was authorised to charge its published rate of fees for that size estate.

The review of the order in this case raised the same issues of principle as raised in other matters before the Tribunal. All three cases were heard together and decisions reserved in each.