JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)
CITATION	**:**	DH [2020] WASAT 100
MEMBER	**:**	MS F CHILD, MEMBER
HEARD	**:**	16 JULY 2020
DELIVERED	**:**	27 AUGUST 2020
FILE NO/S	**:**	GAA 1882 of 2020
		DH Donor

Catchwords:

Guardianship and administration - Enduring power of attorney - Application pursuant to s 109(2)(b) of *Guardianship and Administration Act 1990* (WA) for directions as to exercise of power to enable gifts to be made from estate of donor - Whether Tribunal should exercise discretion to make direction sought - Fiduciary obligations of attorneys - Purpose of *Guardianship and Administration Act 1990* (WA)

Legislation:

Guardianship and Administration Act 1990 (WA), s 71(5), s 72(3), s 72(3)(a), s 74, s 104, s 105, s 106, s 107, s 107(1), s 109, Pt 9, Sch 3
Trustees Act 1962 (WA), s 92

Result:

Application dismissed

Category: B

Representation:

Counsel:

Donor : N/A

Solicitors:

Donor : N/A

Case(s) referred to in decision(s):

DD [2007] WASAT 192
DW and JM [2006] WASAT 366
KS [2008] WASAT 29
Re The Full Board of the Guardianship and Administration Board [2003] WASCA 268
Re The Palermo Unit Trust; Ex parte Phillip Milton Rundell (as Trustee for Various Trusts) [2014] WASC 69

REASONS FOR DECISION OF THE TRIBUNAL:

The application and proceeding before the Tribunal

1 PE filed an application with the Tribunal seeking directions from the Tribunal pursuant to s 109(2)(b) of the *Guardianship and Administration Act 1990* (WA) (GA Act) in respect of an enduring power of attorney (EPA) executed by his mother DH.

2 DH made the EPA on 16 January 2015 (2015 EPA) by which she appointed PE jointly and severally together with DE (PE's spouse) as her attorneys.

3 PE seeks a direction from the Tribunal to advance 50% of the value of bequests left to six of DH's grandchildren in DH's will made in 2016. PE seeks the direction from the Tribunal so that the bank will release these funds.

4 Following the hearing on 16 July 2020 the decision on the application was reserved. These are the reasons for that decision.

5 In all published decisions of the Tribunal in proceedings brought under the GA Act, names and any identifying information are deleted consistent with the provisions of the GA Act.

The evidence and material before the Tribunal

6 The Tribunal has had regard to the following material:

- an application filed by PE with the Tribunal on 17 May 2020 together with a copy of the 2015 EPA;
- a copy of DH's will made 30 September 2016; and
- a medical certificate from DH's doctor (doctor's letter).

7 The 2015 EPA is in the standard form of Form 1 as provided for in Sch 3 of the GA Act. The EPA appoints PE and DE jointly and severally as attorneys. It is styled to be in force from execution and authorises DH's attorneys to do anything that she could lawfully do by an attorney. The 2015 EPA is accepted by the donees in the required form under the GA Act and is witnessed by a qualified witness and another person.

8 The 2015 EPA complies with the requirements for execution of an EPA pursuant to s 104 of the GA Act and Form 1.

9 At clause 4(A) of the 2015 EPA, DH has chosen, by striking out the alternative clause 4(B), that her EPA will continue in force notwithstanding her subsequent legal incapacity. By this election, the 2015 EPA is in force and according to its terms is an unrestricted power and authorises the attorneys to do anything DH could do by an attorney.

10 The 2015 EPA makes no directions to the attorneys and does not authorise gifts to be made on DH's behalf.

11 The copy of the will of DH made on 30 September 2016 includes a number of provisions. It provides at clause 4, bequests to the grandchildren of DH and her late husband in the amount of $50,000 each.

12 The doctor's letter from DH's general practitioner dated 20 April 2020 states :

> I have examined [DH] who has Alzheimer's Dementia with further progression of her cognitive loss.
>
> I have today recommended her son [PE] perform financial and legal decisions on her behalf as per the existing Enduring Power of Attorney.

13 In the hearing PE gave evidence that, until the advice from DH's doctor in April 2020, DH managed her own finances and he provided only practical assistance. PE says that DH wrote cheques as necessary to reimburse him and DE for any expenditure they had incurred on DH's behalf.

14 PE says DH is 92 years old and in fairly sound health and all her grandchildren are now adults.

15 An Aged Care Assessment completed in 2015 notes DH has significant chronic physical health problems and memory loss. A report from the manager of the aged care facility where DH lives dated 17 June 2020 confirms the physical health problems and notes DH has dementia. In the facility manager's report family members, PE and DE, are described as close and supportive. The report states that DH is no longer able to manage her affairs and that PE manages all of her affairs.

16 PE says his proposal is that the adult grandchildren could, if they wished, benefit from an early release of part of the inheritance from DH by an advance of 50% immediately. PE says that only three of the grandchildren wish to take up the proposed advance.

17 PE asserts that advancing funds in this way would not materially impact DH's estate. PE says that DH has sufficient funds between the interest earned on her term deposits and her tax free Department of Veteran's Affairs (DVA) pension of about $24,000 a year to more than cover her current living expenses.

18 In respect of the impact of the proposal on the residuary beneficiaries as provided in DH's 2016 will, PE says that the effect will be minimal. PE says, according to the 2016 will of DH, the remainder of the estate is divided between PE and his two stepsisters upon DH's death. PE says the other residuary beneficiaries support the advances.

19 PE says that the grandchildren who take the advance must enter into an agreement that the remaining $25,000 (of their inheritance) is reduced by the amount of the interest forgone on the funds by DH. PE estimates that this is 2% on DH's term deposits. On his calculations of the balance of the grandchildren's inheritance, the grandchildren would reduce their remaining $25,000 by approximately $42 per month.

20 A handwritten letter from DH dated 3 May 2020 states that she is in full agreement with allowing any or all of her grandchildren to immediately access up to 50% of the amount they will inherit from her estate .

21 PE says that DH is lucid most of the time and is clearly able to express her own wishes in conversation. He refers to DH's handwritten note and asserts that consideration should be given to it.

22 PE says that although he has held the EPA since 2015 he has not acted on it nor provided it to DH's bank until the advice of the doctor that DH could no longer manage her affairs.

23 PE says that DH has no land and consequently the 2015 EPA has not been registered at Landgate.

24 PE says that on presentation of the doctor's letter in April 2020 the bank cancelled DH's chequebook.

25 According to the material before the Tribunal filed by PE the bank has provided PE with internet access to DH's bank account. However, PE says that other than allowing PE access to transfer a few hundred dollars as he has in the past to reimburse expenses made for DH, the bank will not allow PE to operate the account or make the

proposed transfers to the grandchildren without a ruling from the Tribunal.

26 PE filed email correspondence from the bank which included these excerpts from the *A Guide to Enduring Powers of Attorney in Western Australia* produced by the Office of the Public Advocate in Western Australia:

> 5.12 Can I get any instructions if I am not sure what to do as attorney? It is possible for you, as the attorney, to apply to the State Administrative Tribunal for directions about how you should act in particular circumstances. For example, you may seek clarification about whether you have the authority to sell the donor's property; or you may want to obtain a ruling on how a condition or restriction in the enduring power of attorney is to be interpreted.
>
> However, it is not the role of the State Administrative Tribunal to make decisions for you. For example, the Tribunal cannot order you to sell the donor's property, but they can clarify your authority to do so. Subsequently you are responsible for making the decision about proceeding with the sale.
>
> Similarly an attorney contemplating extensive gifting, where it could be considered this is not in the best interests of the donor, may seek direction from the Tribunal in relation to such a proposal.
>
> …
>
> 5.17 The Act does not make provision for you (as attorney) to make gifts from the estate of the donor. However, the Tribunal has previously made a decision that as an attorney, you are not prevented from making a gift on behalf of the donor (unless the enduring power of attorney prohibits gifting). When looking at gifting you must be directed by your duties and obligations to the donor and, in particular, must consider whether the giving of the gift is in the best interests of the donor.
>
> Some factors you might want to consider when making this decision are:
>
> - the relationship between the donor and the beneficiary of the gift;
> - the purpose of the gift;
> - the extent of the donor's estate;

- the needs of the donor and any other person dependent on the donor;
- the likelihood of the donor making the gift if he or she had capacity;
- the attitude of those with a similar relationship to the donor who have not had a gift.

You must also comply with any conditions or restrictions in the enduring power of attorney. It would be unusual for an attorney to make a gift to himself or herself from the estate of the donor. This could lead to significant problems for the attorney and it is recommended that an attorney considering making a gift to him or herself seeks advice about this action. If you are in doubt about gifting from the estate of the donor, you should consider applying for directions from the Tribunal.

27 In his emailed response to the bank, PE challenged the relevance of the information provided to DH's circumstances and his proposal for the advances and asserts that there is no need for the application to the Tribunal. PE asserts that the proposal is in accordance with DH's wishes and that no one has suggested the transactions are not in DH's best interests.

28 In the hearing PE explained that the bank would allow for the payment of DH's living expenses but would not action the larger amounts without something from the Tribunal (ts 6, 16 July 2020).

Legal framework

29 Part 9 of the GA Act provides for the creation of an EPA, the statutory obligations of attorneys and the jurisdiction of the Tribunal to intervene in an EPA.

30 Section 105 of the GA Act provides that an EPA in force is not affected by the subsequent legal incapacity of the donor and further that an act done by the donee during a period of incapacity of the donor is as effective as if the donor were of full legal capacity.

31 Section 107(1) of the GA Act provides:

(1) The donee of an enduring power of attorney -

(a) shall exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, he is liable to the donor for any loss occasioned by the failure;

(b) shall keep and preserve accurate records and accounts of all dealings and transactions made under the power;

(c) subject to section 109(2), may not renounce a power during any period of legal incapacity of the donor; and

(d) shall, if the donee becomes bankrupt, report that bankruptcy to the State Administrative Tribunal.

Penalty applicable to paragraph (b): $2 000[.]

32 Section 109 of the GA Act provides:

(1) A person who has, in the opinion of the State Administrative Tribunal, a proper interest in the matter may apply to the Tribunal for an order -

(a) requiring the donee of an enduring power of attorney to file with the Tribunal and serve on the applicant a copy of all records and accounts kept by the donee of dealings and transactions made by him in connection with the power;

(b) requiring such records and accounts to be audited by an auditor appointed by the Tribunal and requiring a copy of the report of the auditor to be furnished to the Tribunal and the applicant for the order; or

(c) revoking or varying the terms of an enduring power of attorney, appointing a substitute donee of the power or confirming that a person appointed to be the substitute donee of the power has become the donee.

(2) The donee of an enduring power of attorney may apply to the State Administrative Tribunal -

(a) for an order referred to in subsection (1)(c); or

(b) for directions as to matters connected with the exercise of the power or the construction of its terms.

(3) The State Administrative Tribunal may, upon an application under this section or upon receiving a report of a donee's bankruptcy under section 107(1)(d) -

(a) make an order referred to in subsection (1) or (2); or

(b) make such other order as to the exercise of the power or the construction of its terms as the Tribunal thinks fit.

> (4) An order under this section may be made subject to such terms and conditions as the State Administrative Tribunal thinks fit[.]

Fiduciary obligations on donees

33 In addition to the statutory obligations created in s 107 of the GA Act, the donees under an EPA have fiduciary obligations to the donor as agents of the donor.

34 The objective of fiduciary duties is to 'preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage' and to ensure fiduciaries 'conduct themselves at a higher standard than the ordinary person'. The standard they impose is one of 'undivided loyalty by the fiduciary to the principal'. A fiduciary duty is a 'duty which impacts upon conscience by requiring the [agent] to treat the [principal's] interests as paramount' (Dal Pont GE, *Law of Agency* Lexis Nexis Butterworths, Australia 2014).

35 The learned author goes on to say that:

> [D]onees of powers of attorney ('attorneys') as fiduciary agents, must not exercise their authority in such a way contrary to the interests of their principal. So, like other agents, a donee of a power of attorney is, in the absence of a clear power to do so, prohibited from utilising that authority to pay personal debts, or make presents to himself or herself or to others of the principal's property'.
>
> (Citations omitted) Dal Pont at 208.

36 The inference to be drawn from the doctor's letter is that DH lacks capacity to make judgments about her estate because of the progression of her Alzheimer's dementia. Her lack of capacity reinforces the donees' fiduciary obligations to her because of her reliance and dependence on them. The statutory obligations of a donee in s 107 of the GA Act to a donor who has lost capacity expressly addresses this relationship of dependence; a donee cannot renounce a power during any period of incapacity of the donor without an order of the Tribunal.

37 In ***KS*** [2008] WASAT 29 (***KS***) per Barker J considered the general law in respect of an EPA made under the GA Act at [50] and [52]:

> 50 In this regard, it should be noted that there is nothing in the usual Form 1 'Enduring Power of Attorney' or in the general law concerning general powers of attorney that immunises a donee against usual forms of action. A power of attorney is recognised

> as a formal agency relationship: *Parkin v Williams* [1986] 1 NZLR 294 at 299. The donor may grant the donee a general power to do any act, or may confine the donee's authority by only allowing authority to do certain acts. Where the donor grants a general power to act, the donee may do any act the donor could, excluding any act which requires personal skill or discretion which is imposed on the donor personally: *R v Burchill and Salway; Ex parte Kretschmar* [1947] S R Qld 249 at 253.
>
> …
>
> 52 It has long been recognised that a power of attorney, however widely expressed, will not authorise the donee to prefer their own interests over the donor. For example, in *Tobin v Broadbent* (1947) 75 CLR 378 at 401, Dixon J stated:
>
> > 'Prima facie, a power, however widely its general words may be expressed, should not be construed as authorizing the attorney to deal with the property of his principal for the attorney's own benefit. Something more specific and quite unambiguous is needed to justify such an interpretation'.

38 His Honour noted that in respect of gift giving from the estate of the donor (at [56]):

> So far as an enduring power of attorney is concerned, it has been suggested that the fiduciary duty to prefer the principal's interest should be tempered where 'the donee may be in a familial relationship to the donor and may also require support': B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (Sydney, 1992) at 142. This situation has been recognised at least in New Zealand where s 107(2), *Protection of Personal and Property Rights Act 1988*, and in Queensland where s 88, *Power of Attorney Act 1998*, provide that a donee of a power of attorney may give relatives gifts or donate to charities. This provision does not appear to have been replicated in other Australian legislation.

39 As noted there is no provision for an attorney to make gifts under the GA Act but there is nothing in Pt 9 of the GA Act which expressly precludes a donee making gifts from the estate. This was confirmed in previous decisions of the Tribunal on applications under s 109(2): ***DW and JM*** [2006] WASAT 366 (***DW and JM***) and ***DD*** [2007] WASAT 192 (***DD***).

40 In ***DW and JM*** the obligations on attorneys were compared to the provision in the GA Act which proscribes an administrator appointed

by the Tribunal, from making gifts from the estate of the represented person without the express authority of the Tribunal (s 72(3)(a) of the GA Act).

41 The exercise of the discretion by the Tribunal under s 72(3) to authorise gifts is subject to s 71(5) which provides that the Tribunal may take a 'liberal view' of the best interests of the represented person to empower an administrator to make a gift. The factors to be considered were referred to in ***DW and JM*** and reproduced in *A Guide to Enduring Powers of Attorney in Western Australia* sent to PE by the bank.

42 Administrators too may apply to the Tribunal pursuant to s 74 of the GA Act for directions:

> (1) Any administrator may apply to the State Administrative Tribunal for directions concerning any property forming part of the estate of the represented person, or the management or administration of such property, or the performance of any function, and the Tribunal may on any such application give to the administrator any direction not inconsistent with this Act.
>
> (2) An administrator shall comply with any direction given to him under subsection (1).

43 Sections 74 and s 109(2)(b) are analogous to provisions in the *Trustees Act 1962* (WA) (Trustees Act) where a trustee may ask the Court for directions.

44 Section 92 of the Trustees Act provides:

> (1) Any trustee may apply to the Court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee[.]

45 In ***Re The Palermo Unit Trust; Ex parte Phillip Milton Rundell (as Trustee for Various Trusts)*** [2014] WASC 69 His Honour Chaney J declined to give directions for the completion of contracts for the sale of trust property sought by the trustee. He found this was inconsistent with the performance of the trustee's duties, in that case the duty to act impartially between beneficiaries. The case refers to the consideration as to whether judicial advice should be given and if given pursuant to s 92 of the Trustees Act that it should be conservative advice (at [29]).

46 In respect of the question of whether the Tribunal has the power to make directions to advance gifts from the estate of the donor where an EPA itself does not provide for gifting, it seems that the proposal that the donees be authorised to make the advances is 'a matter connected with the exercise of the power' and so comes within the ambit of s 109(2)(b) of the GA Act. On the other hand when read with s 109(3) of the GA Act which provides orders that can be made on an application under that section or **upon receiving a report of a donee's bankruptcy** (emphasis added) might suggest that the nature of the orders or directions contemplated would be consistent with the general supervisory jurisdiction of the Tribunal in respect of EPA's as identified in ***KS*** (at [26]): for example, orders pursuant to s 109(1)(a) and s 109(1)(b) of the GA Act for the filing of accounts or the revocation of an EPA or substitution of a donee (s 109(1)(c) of the GA Act). In ***KS*** (at [46]) the GA Act was described as 'largely to do with vulnerable people, that is to say people who lack capacity' but was found in that case to be wider than that.

47 In ***Re The Full Board of the Guardianship and Administration Board*** [2003] WASCA 268 His Honour, EM Heenan J when considering other provisions of the GA Act described at [43]-[44]the protective intention of the GA Act when considering dispositions which might be made:

> 43. … From this, and an examination of the entire Act, it is obvious that the legislation is designed for the protection of adult persons whose faculties may be impaired, for any reason, and who are therefore in need of protection and assistance so as to ensure that their financial affairs and other welfare is not jeopardised by improvident, or ill considered personal decisions or action, or by unscrupulous or ill advised influence of relatives, friends and others who may deliberately or inadvertently exploit the vulnerability of the person in need of assistance and protection.
>
> 44. These ends can be achieved, when it comes to dealings with the property and financial affairs of the person in need of assistance, by ensuring that any financial, property or commercial transactions which would, or might, jeopardise the financial security or interests of the disabled person, are only effective when performed by a properly appointed administrator and with the Board's consent. The emphasis is on conserving the property and financial resources of the disabled person to ensure that they are available for his or her own needs, welfare and enjoyment and are not dissipated. These seem to be the primary objectives of the legislation and all the provisions of the Act can be seen to have meaning and effect as leading towards the achievement of

> those purposes. In the main, these will be accomplished by conserving the resources and property of the person under administration for use to his or her own advantage or, in cases where expenditure or imminent disposition of property are necessary or advantageous, by scrutinising the transaction to see that it is justifiable or provident having regard to all the circumstances, bearing always in mind the continuing and future needs of the person whose estate is under administration.

48 As in the case of ***DD*** the Tribunal does not consider that the donees in this case are in any way unscrupulous or ill-advised. However, while DH's affairs are not under administration, the protective intent of the legislation is clear.

Whether the Tribunal should exercise its discretion in s 109(2)(b) of the GA Act to make the orders sought

49 The 2015 EPA is in force and has been so since execution by DH in January 2015 as DH made the election at clause 4 of the 2015 EPA. As such the Tribunal need not (and cannot) make any declaration under s 106 of the GA Act regarding the operation of the 2015 EPA.

50 Attorneys with unrestricted authority can on behalf of the donor undertake a bank transfer, open or close an account and generally conduct the financial dealings of the donor.

51 It is the case that DH's 2016 will, although accepted as an expression of her wishes for distribution of her deceased estate, is not in effect until her death.

52 The Tribunal accepts that the proposal for advances from the estate of DH to her grandchildren during her lifetime will not have a material impact on meeting the known financial needs of DH during her lifetime.

53 The proposal does not directly benefit the attorneys since the gifts are not directed to them.

54 The Tribunal accepts that when asked about the proposal DH supported it and that this according to PE is consistent with her past generosity to her grandchildren.

55 Had DH directed the attorneys to make the advances prior to her loss of capacity they would be required to follow that direction. Since her loss of capacity she can no longer direct them.

56 A direction under s 109(2)(b) of the GA Act is in the nature of advice rather than a mandatory direction as in s 74 of the GA Act as there is no use of the word 'shall'. The 2015 EPA itself makes no provision for gifts and the GA Act itself is silent on the question.

57 Having regard to the provisions in Pt 9 of the GA Act, there is a question whether such a direction is contemplated. Even if it accepted that the proposal for advancing gifts from DH's estate is an incidence of the exercise of the power and therefore falls within the ambit of s 109(2)(b) of the GA Act and the Tribunal could make the direction, it is the view of the Tribunal that in the exercise of any discretion under the GA Act the Tribunal must consider the protective intent of the GA Act as a whole, for these reasons the Tribunal declines to make the direction sought.

58 As fiduciaries the attorneys are bound to consider their obligations to DH as paramount and then to consider whether the proposal to advance gifts is consistent with those obligations. Whether they proceed with the proposal is a question for their judgment, if necessary obtaining legal advice which they might produce to the bank.

59 For these reasons the Tribunal makes the following orders:

Orders

> On the application pursuant to s 109(2)(b) of the *Guardianship and Administration Act 1990* (WA) lodged by the applicant for directions in respect of an enduring power of attorney dated 16 January 2012 by which DH appointed PE and DE as her joint and several attorneys, determined by Member F Child on 17 August 2020.
>
> It is ordered that:
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> 1. The application is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS F CHILD, MEMBER

27 AUGUST 2020