Professionals' role in preventing elder financial abuse

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Professionals should take an active role in protecting the elderly to minimise financial abuse from their relatives.

The demographic of the Australian population is changing — life span is increasing and with it there is an increase in the proportion of the population called "aged".[1]

Of those between 80 and 84 years old, 12% have some form of dementia. For those over 94, it is 40%.[2]

These demographic features drive the ever-growing need for members of our ageing population to have a substituted decision-maker, to assist them in managing their affairs as their capacity declines, either through an enduring power of attorney or a court-appointed administrator.

This cohort holds significant wealth and the statistics demonstrate they are dangerously exposed to the unscrupulous, with the Queensland Elder Abuse Prevention Unit estimating the cost of elder financial abuse to be around $1.8b.[3] The Victorian Royal Commission into Family Violence has heard that 92% of abuse of the elderly is perpetrated by adult children. Victoria reports 179 of its elderly lost in the region of $56.7m in the years 2013-14 through elder financial abuse. Aligned with those figures, the Public Trustee of Queensland reports that enduring powers of attorney are the main source of reported financial abuse to older people.[4] The Public Trustee is typically appointed as a financial administrator if a suitable alternative is not available.

Although all jurisdictions have powers of attorney and guardianship legislation, which provides for detection, prevention and redress of elder abuse through that state or territory's administrative tribunal, with the jurisdiction's Supreme Court having an oversight and appellate role, the legal system can only go so far in protecting the elderly. It holds attorneys and administrators ("representatives") to the highest standards, but this is often reviewed after the fact, after the abuse may have already occurred. The legal system only examines those cases brought to its attention and remedies wrongs or directs representatives how they should act in a particular set of circumstances, it cannot supervise attorneys. It can supervise administrators to a limited extent. A significant distinction between the appointment of an enduring power of attorney and a financial administrator is that the donee of an enduring power of attorney is not required to undergo any scrutiny prior to accepting an appointment, whereas a prospective financial administrator is subject to a great deal of scrutiny and oversight by the applicable tribunal as to their suitability and financial management skills.

Solicitors have long played a role in protecting the represented person. Solicitors are frequently approached for advice where a representative faces uncertainty as to a course to follow. Sometimes solicitors may become involved indirectly, such as when they are approached for release of documents by representatives. In these circumstances, the regulatory framework to which solicitors are subject imposes on them the position of gatekeeper, which can assist in preventing abuse or advising these representatives how to improve their performance. These duties can include recommending the representative seek financial or accounting advice as to the investment and management of the adult's funds. In that context, recent decisions in Queensland demonstrate the value accountants and financial advisers can provide in minimising financial abuse.

The recent decisions focus on the protective mechanisms within the legislative scheme to prevent conflict and gifting transactions without authority, unless it is naturally and reasonably a gift the represented person might make.[5] The typical examples are birthday and Christmas presents. The question, however, sometimes arises as to whether it is proper for a representative to make large gifts on behalf of the represented person when that was their custom prior to loss of capacity. A recent Queensland Civil and Administrative Tribunal (QCAT) decision examined this scenario.[6]

FK involved an application under the *Guardianship and Administration Act 2000* (Qld) (GAA) by the then recently appointed financial administrator referred to in the judgment as GJ. GJ was appointed as a financial administrator for FK, who was 94 at the time of the application. GJ applied for an order that the tribunal approve financial gifts to a number of FK's relatives.

The extent of the proposed gifts was significant, totaling $112,000 and including "Christmas gifting to 23 family members and a family friend totaling $67,000" and "birthday gifts to 48 family members and 1 friend totaling $45,500".[7]

GJ (the administrator) was one of those family members to receive the gifts.

The decision traces the mechanics of the process that the administrator was required to undertake and the evidence required in order to satisfy the tribunal that the proposed gifts were ones that ought to be approved and not a conflict of interest or financial abuse of FK.

The decision examines the provisions of the GAA that relate to the powers exercised by the decision-maker and their

responsibilities (including the duty to avoid conflict transactions unless authorised).[8] Similar provisions are found in legislation in all other Australian jurisdictions.

This was succinctly summarised at para 27:

> "The Administrator is required by principle 11 of the General Principles to act in a way that is appropriate to FK's circumstances. The Administrator is required to act with honesty and with reasonable diligence in relation to the adult's affairs. The Administrator is required to avoid conflicts of interest.
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> The Act in section 54 deals specifically with the situation of gifts. The section provides that unless the Tribunal orders otherwise, an Administrator for an adult may give away the adults property only if:
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> a) the gift is
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> i) a gift of the nature of the adult would make when the adult had capacity
>
> ii) a gift of the nature that the adult might reasonably be expected to make
>
> b) the gifts value is not more than what is reasonable having regard to the circumstances and, in particular, the adult's financial circumstances."

The question for determination was whether financial gifts totaling $112,000 satisfied these criteria. Of notable relevance was that FK "is a person of considerable financial means who was in the practice of giving monetary gifts to children, grandchildren and others at Christmas, birthdays and other special occasions".[9]

In approving the gifts, the decision pays particular attention to the evidence of FK's long standing accountant of 15 years.[10]

In establishing the case, GJ was also directed by the tribunal to provide an opinion from FK's financial adviser as "to her ability to make these gifts and the appropriateness of the gift giving in the context of FK's financial circumstances".[11]

Both the accountant and the financial adviser provided opinions that the gifts would not deplete FK's assets, and that the gifts were proportional to FK's financial resources and consistent with her history of giving. Such opinions satisfied the tribunal that GJ's proposed actions were proper. The tribunal was satisfied that the evidence of the accountant satisfied the requirement of independence advice,[12] and that FK had "the financial capacity to make gifts and that they are appropriate in FK's financial circumstances".[13]

Noting that "[t]he circumstances of this matter are unique and unusual",[14] the tribunal ultimately found that the "that the gift-giving program can be undertaken without unreasonably compromising FK's financial position. Her interests are being protected but her wishes are also being served".[15] It should also be noted that the approval was confined "for the 2017-2018 period".[16]

While an unusual decision, it demonstrates that not all financial exchanges between represented persons and their family members are laced with menace, deprivation and dishonesty. GJ is to be commended for bringing the application to QCAT and seeking the tribunal's approval of the transactions before undertaking them. Receiving such approval from QCAT protects GJ from allegations of financial abuse in those circumstances. The tribunals in all Australian jurisdictions may be approached for advice or directions on any question. This avenue ensures that a proper course is followed while providing personal protection for the approved actions.

This case also brings to light that accountants and financial advisers have the opportunity to, and should be attuned to, financial abuse of their ageing clients. The long-term relationships and insight into their clients' family relationships and assets make accountants and financial advisers prime candidates for identifying abuse and seeking to prevent it or reporting it. Given the times we live in, professionals have a responsibility not to turn a blind eye to or be passive about such potential issues, but to be alert and adopt an inquisitive approach.

Readers are referred to the equally unusual matter of *Re CMB*,[17] where in a split decision, the majority tribunal approved the sale of the incapacitated adult's family home and distribution of the proceeds to her children. This represented 70% of her assets.[18] The split nature of that the decision is particularly instructive to legal advisers as to the differing approaches to interpreting the legislation.

The cases are clear that these situations turn on their own facts, and that a prudent substituted decision-maker will seek tribunal sanction before making substantial gifts on behalf of the represented person or entering into conflict transactions.

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References

1 ABS, "One in four Australians aged 65 years and over by 2056", media release, 4 September 2008 — one in four Australians will be 65 or older by 2056, up from one in ten in 2007.

2 Australian Health Ministers Conference, National Framework for Action on Dementia 2006-2010, North Sydney May 2006, p 2.

3 L Jackson, *The cost of elder abuse in Queensland: who pays and how much*, Elder Abuse Prevention Unit – Qld, June 2009, p 3.

4 The Public Trustee of Queensland is quoted in the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, AGPS 2007, pp 80-81.

5 Ss 66 and 73 of the *Powers of Attorney Act 1998* (Qld); ss 35 and 37 of the *Guardianship and Administration Act 2000* (Qld); see also s 64 of the *Powers of Attorney Act 2014* (Vic); s 32AC of the *Powers of Attorney Act 2000* (Tas); s 42 of the *Powers of Attorney Act 2006* (ACT); as to all other jurisdictions, the common law applies.

6 *FK* [2017] QCAT 469.

7 *FK* at [8].

8 See ss 35 and 37 GAA. See also the corresponding provisions in the *Powers of Attorney Act 1988* (Qld): ss 66 and 73; ss 63 and 77 of the *Powers of Attorney Act 2014* (Vic).

9 *FK* at [2].

10 *FK* at [18-21].

11 *FK* at [18].

12 *FK* at [22].

13 *FK* at [24], [36] and [45].

14 *FK* at [28].

15 *FK* at [43].

16 *FK* at [42].

17 [2004] QGAAT 20.

18 Ibid at [50].