

# Gifts, grannies and the GAA

The demographic of the Australian population is changing – lifespans are increasing, and with this there is an increase in the proportion of the population called ‘aged’.<sup>1</sup>

Of those between 80 and 84 years old, 12% have some form of dementia. For those over 94, this figure is 40%.<sup>2</sup>

These demographic features drive the ever-growing need for members of our aging population to have a substituted decision maker to assist them in managing their affairs as their capacity declines.

This cohort holds significant wealth and the statistics demonstrate they are dangerously exposed to the unscrupulous, with estimates putting the annual cost of elder financial abuse in Queensland at a minimum of \$1.8 billion.<sup>3</sup>

Aligned with such figures, the Public Trustee of Queensland reports that enduring powers of attorney (EPAs) are the main source of reported financial abuse of older people.<sup>4</sup> The Public Trustee is typically appointed as a financial administrator if a suitable alternative is not available. Relevantly, a significant distinction between the holder of an EPA and a financial administrator is that the person holding an EPA is not required to undergo any scrutiny prior to accepting appointment, whereas a prospective financial administrator is subject to a great deal of scrutiny and oversight by the Queensland Civil and Administrative Tribunal (QCAT) as to their suitability and financial management skills.

A protective mechanism within the legislative scheme is to prevent conflict and gifting transactions without authority, unless it is naturally and reasonably a gift that the adult might make.<sup>5</sup> The typical examples are birthday and Christmas presents. The question, however, sometimes arises whether it is proper for an attorney/financial administrator to make large gifts on behalf of their principal when that was their custom.

“

When a gift is deserved, it is not a gift but a payment.”

– Gene Wolfe, *Shadow & Claw*

A recent QCAT decision examined this scenario – *FK* [2017] QCAT 469 (*FK*), delivered on 18 December 2018.

*FK* involved an application under the *Guardianship and Administration Act 2000* (Qld) (GAA) by the then recently appointed financial administrator GJ of *FK*, who was 94 at the time an order was sought for the tribunal to approve financial gifts to numerous relatives of *FK*.

The extent of the proposed gifts was significant. They were worth a total of \$112,000 and included “Christmas gifting to 23 family members and a family friend totalling \$67,000” as well as “birthday gifts to 48 family members and 1 friend totalling \$45,000”.<sup>6</sup>

The administrator, GJ, was one of those family members to receive the gifts.

The decision traces the mechanics of the steps the administrator was required to undertake and the evidence necessary to satisfy the tribunal that the proposed gifts were ones that ought to be approved.

The decision addresses the provisions of the GAA relating to the powers exercised by the decision maker, and their responsibilities including the duty to avoid conflict transactions unless authorised.<sup>7</sup>

These were succinctly summarised at paragraph [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.

“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 adult’s property only if:

- a) the gift is
  - i) a gift of the nature that 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 gift’s 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 totalling \$112,000 satisfied this 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”.<sup>8</sup>

In approving the gifts, the decision pays particular attention to the evidence of *FK*’s long-standing accountant of 15 years.<sup>9</sup>

Noting that “[t]he circumstances of this matter are unique and unusual”,<sup>10</sup> the tribunal ultimately found “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.”<sup>11</sup> It should also be noted that the approval was confined to “the 2017-2018 period”.<sup>12</sup>

While an unusual decision, it demonstrates that not all financial exchanges between incapacitated adults and their family members are laced with menace, deprivation and dishonesty.

In addition, I refer you to the equally unusual matter of *CMB*, *Re* [2004] QGAAT 20, 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.<sup>13</sup> The split nature of that decision is particularly instructive to practitioners in illustrating the differing approaches to interpreting the legislation.



with Christine Smyth

Having regard to these decisions and the level of oversight a financial administrator is subject to, it raises the question of whether the level of abuse in the case of FPAs could be reduced if a similar approach to suitability and reporting factors was applied before a person is appointed as an attorney. The cases are clear that these situations turn on their own facts and a prudent substituted decision maker will seek QCAT sanction before making gifts on behalf of the principal or entering into conflict transactions.

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Notes

- <sup>1</sup> Australian Bureau of Statistics media release, 4 September 2008 – one in four Australians will be 65 or older by 2056 – up from one in 10 in 2007.
- <sup>2</sup> Australian Health Ministers Conference, National Framework for Action on Dementia 2006-2010 at 2, North Sydney, May 2006.
- <sup>3</sup> Queensland Elder Abuse Prevention Unit, 'Cost of Elder Abuse: Who Pays and How Much' (June 2009): 3.
- <sup>4</sup> Public Trustee Queensland is quoted in the House of Representatives Standing Committee on Legal and Constitutional Affairs – *Order People and the Law*, AGPS 2007, at 80-81.
- <sup>5</sup> Sections 66 and 73 *Powers of Attorney Act 1988* and sections 35 and 37 *Guardianship and Administration Act 2000* (Qld) (GAA).
- <sup>6</sup> A:[6].
- <sup>7</sup> See sections 35 and 37 of the GAA; see also corresponding provisions in the *Powers of Attorney Act 1988* (Qld), sections 66 and 73.

- <sup>8</sup> At [2].
- <sup>9</sup> At [18-21].
- <sup>10</sup> At [28].
- <sup>11</sup> At [43].
- <sup>12</sup> At [42].
- <sup>13</sup> At [50].

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