

CITATION: KOJ [2016] QCAT 302

PARTIES: KOJ

APPLICATION NUMBER: GAA10722-15, GAA12680-15, GAA12681-15

MATTER TYPE: Guardianship and administration matters for adults

HEARING DATE: 5 May 2016, (oral hearing); further on the papers hearing on 28 July 2016

HEARD AT: Southport

DECISION OF: **Member Mc Donald**

DELIVERED ON: 2 August 2016

DELIVERED AT: Southport

ORDERS MADE:

1. **The Public Guardian is appointed as guardian for KOJ for the following decisions:**
 - (a) **With whom KOJ has contact and/or visits;**
 - (b) **Health care; and**
 - (c) **Accommodation.**
2. **This appointment remains current until further order. It is reviewable and is to be reviewed in five (5) years.**
3. **The Public Trustee of Queensland is appointed as administrator for KOJ for all financial matters.**
4. **This appointment remains current until further order of the Tribunal. It is reviewable and is to be reviewed in one (1) year.**
5. **The Tribunal directs the administrator to provide accounts when requested.**
6. **The Tribunal directs the administrator to provide a financial management plan within four (4) months of this order.**
7. **The address details of AD are to be de-identified in documentation on KOJ's file.**

CATCHWORDS: GUARDIANSHIP – ADMINISTRATION – ENDURING POWER OF ATTORNEY – where attorney appointed under enduring power of

attorney document for financial matters only – where decision-maker needed for personal and health matters – where conflict between siblings – where complex financial arrangements – where considerable sums of money withdrawn by attorney without explanation – where appointment of attorney under the enduring power of attorney document overtaken by Tribunal – where confidentiality order requested

Guardianship and Administration Act 2000 (Qld), ss 12, 14, schs 1, 4
Property Law Act 1974 (Qld), s 175A
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 66

APPEARANCES:

KOJ (Adult)
 CJ (son)
 QJ (son)
 AD (daughter)
 SD (son-in-law)

REASONS FOR DECISION

- [1] KOJ is a 90 year old lady who now resides in a nursing home. She has been diagnosed with dementia. KOJ has three children, CJ, QJ and AD. KOJ appointed her son CJ as her enduring power of attorney on 22 August 1997 under s 175A of the *Property Law Act 1974* (Qld). That legislation did not afford powers in relation to personal and health matters. Following encouragement by the hospital staff where KOJ was being treated, CJ approached the Tribunal in October 2015 for appointment as her guardian to make personal decisions on her behalf. He stated that he had not been aware that the appointment did not extend to these powers.
- [2] Subsequent to this application, AD filed an application for the appointment of a guardian and administrator for KOJ, citing concerns that she had been isolated from contact with KOJ by the attorney and had concerns that there was a lack of transparency in the control of KOJ's funds. She proposed herself in these roles.
- [3] The Tribunal considered the application for the appointment of a guardian. Before the Tribunal makes an appointment of a guardian, it must be satisfied that the elements of s 12 of the *Guardianship and Administration Act 2000* (Qld) ('GAA Act') are made out:

The tribunal may, by order, appoint a guardian for a personal matter, or an Administrator for a financial matter, for an adult

if the tribunal is satisfied—

- (a) the adult has impaired capacity for the matter; and
- (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- (c) without an appointment—
 - (i) the adult's needs will not be adequately met; or
 - (ii) the adult's interests will not be adequately protected.

- [4] A medical report of Dr C, Medical Officer at Greenslopes Hospital, dated 2 October 2015 was provided to the Tribunal as evidence of KOJ's decision-making ability. Dr C states that KOJ was diagnosed with Alzheimer's dementia in 2014, with significant changes in her brain scan associated with progression of the disease since then. Cognitive testing was conducted and returned scores indicative of impaired cognition. Dr C considers that KOJ cannot make decisions freely and voluntarily. She described rapid short-term memory loss and mild comprehension difficulties as preventing her understanding information and her ability to act on it, and significantly affecting her understanding of consequences of decisions. Dr C remarked that KOJ was unable to make complex health decisions, and could not recall why she was admitted to hospital. She described her as having poor insight into her functional limitations, with her short-term memory limiting her ability to understand the nature and consequences of decisions. She described her as having impaired judgement around her finances and difficulty performing money related calculations, and considered she was unable to manage her financial affairs. She considered she could not understand the necessary elements to execute a valid enduring power of attorney at the date of the report.
- [5] The medical evidence available to the Tribunal indicates that KOJ is unable to understand the nature and effect of decisions around personal health, accommodation and lifestyle and finances, and could not make decisions freely and voluntarily. Consequently, the test for capacity as identified at schedule 4 of the GAA Act is not made out. The Tribunal finds that KOJ has impaired capacity for personal and financial matters as a result of her dementia.
- [6] The Tribunal turned to the balance of the considerations under s 12 of the GAA Act noted above. KOJ is accommodated in a nursing facility on the Gold Coast, placed there under the statutory health regime through CJ and QJ. AD objects to the lack of consultation involved in this decision. As she lives in Brisbane, she indicated that she would like KOJ to live in Brisbane, or for the possibility to be considered. She stated that she felt that she had been "kept out of the loop" in relation to her mother's health care. Her application stated that she felt that CJ had prevented her and her family from visiting KOJ. CJ denied that this was the case, and indicated that she had been on outings at times which coincided with AD's visits, but that there had not been any intent to limit her contact. AD strongly believed that she was being actively excluded from her mother's

life. Both CJ and AD agreed that relations were tense between them. CJ indicated that he did not personally want to have contact with AD.

- [7] CJ indicated that he had been providing for his mother's care needs since his father died, taking her to appointments, and co-ordinating her support needs. QJ endorsed that CJ had taken on this key role and had his mother's full trust in all matters. He said that it had been recommended to him that he seek guardianship at a time when KOJ was in hospital and her care needs had increased significantly.
- [8] There remain health decisions which need to be made and given the apparent conflict between the siblings, there is no clearly accepted automatic authority for health decisions under the statutory health attorney regime as a result.
- [9] The evidence suggests that AD is not content with KOJ's accommodation in terms of its location and she believes that she has been obstructed in her relationship with her mother. The Tribunal considers that where such discontent exists, specifically impaired communication with AD in relation to critical decisions and AD's concerns about isolated from her mother, there is a need for personal decisions to be made. General Principle 8 outlined at schedule 1 of the GAA Act notes the importance of maintaining the adult's relationships in making decisions under this legislation. While it was not accepted that AD is being actively alienated from her mother, there is clear conflict between the siblings, making communication between them fraught with hostility. In such circumstances there is a need for decisions to be made around contact with AD, and potentially accommodation and health care decisions. Without an appointment, KOJ's interests may not be protected.
- [10] The Tribunal must consider the appropriateness of the proposed appointee. In the circumstances of significant conflict between CJ and AD, an independent decision-maker is considered necessary. The Public Guardian is appointed for decisions pertaining to accommodation, health care and contact.
- [11] The Tribunal considered the appointment of an administrator under s 12 of the GAA Act. The Tribunal firstly considered whether there was a need for financial decisions to be made and whether without an appointment KOJ's needs would be adequately met or her interests adequately protected.
- [12] CJ has been managing his mother's financial affairs since her husband died some 19 years earlier. He has been acting under the enduring power of attorney of 22 August 1999 and considers there is no need for the appointment of an Administrator. QJ agrees with this contention. They both agreed that KOJ had trusted CJ to manage her affairs and never raised any concerns in the 19 years in which he acted on her behalf in her financial matters. QJ considered that she had many opportunities to have raised any concerns with him, if she had been concerned about CJ. He stated that he was confident that there was no impropriety in his management of KOJ's affairs.

- [13] AD and her husband agreed that KOJ did comprehensively trust CJ, but they raised doubts about whether there was a valid basis for that trust. AD presented concerns about the transparency of dealing in relation to KOJ's finances. She raised concerns particularly about where the proceeds of the sale of the real property had been placed. She cast a number of aspersions on CJ's character but provided no objective evidence that the Tribunal could rely upon. She was concerned that CJ had not been open with her in relation to financial decisions he was making. She asserted concerns that in the absence of openness, CJ may be using his mother's funds to invest in unauthorised investments. CJ strongly denied this and stated that he did not mix his mother's funds with his own in any of his investments. She raised some associations he may hold and referred to a newspaper clipping she had filed which mentioned his associates. The Tribunal is unable to rely on such material and notes that CJ's personal business decisions are not before the Tribunal for consideration. To the extent that this was intended to depict the character of CJ, the Tribunal cannot and does not rely on these unsupported and vague references.
- [14] At the hearing CJ reported that the proceeds of the sale of the house was \$720,000.00 and that a total of \$1.3 Million was deposited to term accounts with Commonwealth, Bank, CUA and Suncorp who each now hold a balance of \$500,000. He noted that the refundable accommodation bond of \$525,000.00 has been paid. He described KOJ's income as totalling approximately \$250,000.00 per year, derived from \$140,000.00 to 150,000.00 share income, \$15,000.00 term deposit income, DVA pension of approximately \$950.00 per fortnight, and \$1254.00 per fortnight from her Commonwealth Superannuation Pension.
- [15] The Tribunal made directions for the submission of evidence to verify the statements made, specifically directing the submission of KOJ's bank statements since November 2015 when the proceeds of the sale of the house would be identifiable. Submissions around these were sought from the parties.
- [16] The attorney submitted the following documents relating to KOJ's assets: the Commonwealth Bank passport account, the Credit Union Australia (CUA) pension account, Suncorp Term deposit and account, ANZ account, Commonwealth Bank Term Deposit, CUA Term Deposit and share valuations from 30 November 2015 to 30 April 2015 and receipts for the residential accommodation deposit totalling \$525,000.00.
- [17] The Tribunal notes the following matters in relation to the documents provided. Although there is evidence that the real property sold, there is no clear bank entry to indicate how the funds were distributed and the full amount received upon sale.
- [18] Documentation submitted in the share portfolio does not indicate any significant changes beyond probable market fluctuations. There are no concerns in relation to decisions made about KOJ's share portfolio.

- [19] The CUA pensioner account holds funds from the CommSuper pension, together with some share dividends. This account shows cash withdrawals at such places as a Gold Coast Tavern where on 18 March 2016, a total of \$2,000.00 was withdrawn in three transactions (for \$900.00, another of \$900.00 and another for \$200.00, each incurring \$2.50 bank fees at each withdrawal). On 7 January 2016, a withdrawal of \$750.00 at a Gold Coast Casino is made incurring a \$2.50 transaction fee. There are irregular sizeable sums between \$600.00 and \$1,200.00 withdrawn from this account from ATM machines throughout the period. It is noted that KOJ has been in care during that time.
- [20] None of KOJ's accounts identify a clear indication of how her ongoing monthly nursing home fees are paid, although no suggestion has been raised that these are outstanding. There is no transparency evident in the withdrawals and the application of these funds. There are withdrawals of different amounts each month and the funds expended from each of KOJ's account. The total withdrawals across all of her accounts differ considerably from month to month. This is not consistent with the expenses associated with an adult in a full-time residential care facility.
- [21] The Commonwealth Bank passbook account receives the DVA pension and some dividends from time to time. Significantly, this account shows a significant number of sizeable withdrawals following the receipt of dividends from shares. In particular, on 15 September 2015, \$30,000.00 was withdrawn from this account. The following withdrawals have not been explained and the absence of explanation causes the Tribunal concern: \$9,405.00 on 15 January 2016; \$5845.00 on 15 April 2016 and a further \$3000.00 on 28 April 2016. There are a number of other unexplained withdrawals. It is noted that there is some transferring between accounts prior to the term deposits in December 2015 when some funds appear to be consolidated into the three large term deposits.
- [22] Overall, spending across the three accounts varies considerably from month to month. It would seem that even after the term deposits were locked in December 2015, monthly spending varied between approximately \$7,000.00 and \$18,000.00 in the months following. It is unclear why her expenses vary so considerably from month to month and why they would be so high when her costs are primarily nursing home accommodation costs, which would be largely consistent from month to month. There appears to be inconsistent spending patterns and withdrawals from ATMs in inconsistent amounts and some withdrawals are occurring at a tavern and casino ATM for sizeable amounts in multiple transactions on the same day. The attorney gives no explanation for these withdrawals despite the opportunity for written submissions.
- [23] KOJ's regular expenditure has not been fully accounted for given these considerations. The evidence does not indicate that in all areas of KOJ's financial management that prudent decisions have been made. Sound decisions appear to have been made around share management and funds investment, but KOJ's expenditure appears to exceed her needs. On balance, the evidence raises concerns about the prudence of the

attorney's decisions around expenditure. The Tribunal finds that given concerns about the attorney's decisions and the complexity of KOJ's financial arrangements, there are financial decisions which need to be made, and without an appointment her interests will not be adequately protected. The appointment of the attorney is overtaken by the appointment of an Administrator.

- [24] At the hearing, it was noted by all of KOJ's children that KOJ had previously gifted her children \$13,000.00 each year for the past eight to ten years. KOJ was asked about this during the hearing and she commented that this had been a practice she was aware of and had agreed with. These transactions are not specifically authorised in the enduring power of attorney document signed by KOJ on 22 August 1997. This ongoing gifting constitutes a conflict transaction. There is an express obligation noted in the enduring document to avoid conflicts of duty and interest, unless explicitly authorised. This is an unauthorised conflict transaction. While KOJ is in a strong financial position, in light of oral evidence of a \$140,000.00 capital gains tax obligation, and the concerns raised about unaccounted for expenditure, it would be appropriate that such gifting is scrutinised carefully. Should the attorney's appointment be reactivated at a later time, it would be appropriate for him to seek approval for the unauthorised gifting from the Tribunal.
- [25] The Tribunal considered who would be the appropriate appointee. In the circumstances of the ongoing family tension and conflict between the proposed appointees, AD and CJ, the Tribunal considers that an independent substitute decision-maker is appropriate.
- [26] The Tribunal appoints The Public Trustee of Queensland as administrator for KOJ for all financial matters. The appointment shall be reviewed in 12 months.
- [27] AD sought a confidentiality order in relation to her address. She did not seek to discuss this at the hearing. However, she did provide evidence at the hearing that she felt intimidated by her brother, and also described feeling bullied. She filed a further request for a confidentiality order in these terms after the hearing. The Tribunal may seek to protect information under s 66(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), for reasons which include that it is in the interest of justice. While there is no evidence that she is at risk in any way, on her own evidence, she feels anxious that her personal address may be revealed. In light of the conflict that exists between the parties, and AD's expressed concerns, the Tribunal does not find it in the interests of justice that her address be identifiable on any documentation held on file or available to other parties.