

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter “Agreement”) is entered into by and between Philip Kapusta and Lynn Kay, who collectively may be referred to herein as “the Parties.”

RECITALS

WHEREAS, Elaine Mae Kapusta is the mother of two children, Philip Kapusta and Lynn Kay.

WHEREAS, on or about August 9, 2018, Mr. Kapusta filed a Petition in the Fairfax County Circuit Court, styled *Philip Kapusta v. Elaine Kapusta and Lynn Kay*, Case No. 2018-11871 (the “*Lawsuit*”), asking the Court, *inter alia*, to declare Ms. Kapusta incapacitated and to appoint a guardian and conservator for Ms. Kapusta;

WHEREAS, on January 7, 2020, the Parties engaged in a mediation to resolve the Lawsuit;

NOW, therefore, in consideration of the mutual covenants contained herein and intending to be legally bound thereby, the Parties agree as follows:

1. **Pending Litigation.**

a. The Parties agree that six months from the date of this Agreement, they authorize their counsel to jointly request that the Court find that Ms. Kapusta is incapacitated and in need of a guardian and conservator.

b. At the hearing on the Parties’ Joint request, the Parties as well as Counsel and the Guardian *ad Litem* for Elaine Kapusta shall submit to the Court the proposed Order of Appointment of Guardian, Conservator, and Trustee, attached hereto Exhibit A, with any reasonable revisions requested by the proposed Conservator, Cary Z. Cucinelli, Esq.

2. **Care Manager.** The Parties agree that upon execution of this Agreement, Elaine Kapusta, by her agent Lynn Kay, shall hire a care manager recommended by the Guardian *ad Litem* to oversee the care of Elaine Kapusta.

3. **Visitation by Philip Kapusta.** The Parties agree that Philip Kapusta may arrange reasonable times up to twice a month to visit with Elaine Kapusta at her home by coordinating with the care manager hired to oversee the care of Elaine Kapusta. Lynn Kay agrees that she shall not be present during Philip Kapusta's visitation with Elaine Kapusta.

4. **Salary.** For the next six months until a Conservator is appointed by the Court, Lynn Kay shall be entitled to an annual salary of \$90,000 (\$45,000 for six months) to be paid from Elaine Kapusta's funds to compensate her for her care services on behalf of Elaine Kapusta.

5. **Capital Improvements to Rental Properties.** Over the past several years, Lynn Kay has caused capital improvements to be made to the following properties beneficially owned by Elaine Kapusta, which shall be referred to herein collectively as the "Rental Properties": (1) 4132 N. 21st Road, Arlington, Virginia; (2) 4133 N. 21st Road, Arlington, Virginia; (3) 4137 N. 21st Road, Arlington, Virginia; (4) 4144 N. 21st Road, Arlington, Virginia; (5) 4145 N. 21st Road, Arlington, Virginia; and (6) 1451 Wasp Lane, McLean, Virginia. The Parties agree that Lynn Kay shall have no more than six months from the date of this Agreement to complete her planned capital improvements, the cost of which improvements shall not exceed \$600,000 paid with Elaine Kapusta's funds. Accordingly, Lynn Kay agrees that she shall not sell, encumber, or transfer any of the Rental Properties.

6. **Assessment of Capital Improvements.** The Parties agree that at such time as the Rental Properties are sold or distributed by the Conservator or the Trustee, the Conservator or Trustee shall commission a report by an MAI appraiser to determine whether the totality of the

capital improvements to any one property made by Lynn Kay were excessive, considering the properties as rental properties and taking into account the past rental income, potential future rental income, and any tax consequences. Should the appraiser find that the totality of the capital improvements made to any one of the Rental Properties by Lynn Kay was excessive, the amount of the excess shall be considered an advance against Lynn Kay's share of Elaine Kapusta's estate after Elaine Kapusta's death. Conversely, should the appraiser find that the totality of the capital improvements made to any one of the Rental Properties by Lynn Kay created a surplus of value, then such increase in value may be used to offset any excess found as to another property.

7. **Renunciation as Executor.** The Parties agree to renounce their right to serve as Executor of Elaine Kapusta's Will by signing the form attached as Exhibit B. The Parties further agree that Cary Z. Cucinelli may serve as Administrator c.t.a. of Elaine Kapusta's estate.

8. **Releases.**

a. Philip Kapusta's Release. By executing this Agreement, Philip Kapusta releases, acquits and forever discharges Lynn Kay from any and all claims and causes of action, including, but not limited to, any allegations asserted by him in the Lawsuit. This release does not apply to claims that may arise after the date of this Agreement.

b. Lynn Kay's Release. By executing this Agreement, Lynn Kay releases, acquits and forever discharges Philip Kapusta from any and all claims and causes of action. This release does not apply to claims that may arise after the date of this Agreement.

9. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties with respect to the matters set forth herein, and supersedes any and all previous oral or written understandings or agreements with respect to the claims released herein.

10. **No Admission.** This Agreement is a compromise of disputed and controverted claims, with due mind to the cost of litigation and does not constitute an admission of fact or liability in any respect by any party.

11. **Governing Law.** This Agreement shall be in all respects interpreted, enforced, and governed by and under the laws of the Commonwealth of Virginia, without respect to its conflict of laws principles.

12. **No Adverse Construction.** The Parties and their respective counsel have reviewed this Agreement. Any usual rule of construction requiring that ambiguities are to be resolved against a particular party, or in favor of a particular party, shall not be applicable in the construction or interpretation of this Agreement.

13. **Enforcement.** The Parties agree that the Circuit Court of Fairfax County shall be the exclusive jurisdiction to enforce this Agreement, and the Parties agree to submit to its jurisdiction.

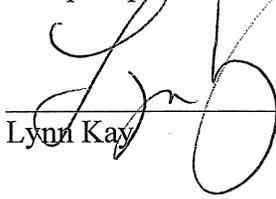
Signatures Follow on Next Page

IN WITNESS WHEREOF, and intending to be legally bound hereby, the Parties set forth their signatures on the respective dates set forth below.

1-7-2020
Date Signed


Philip Kapusta

1/7/20
Date Signed

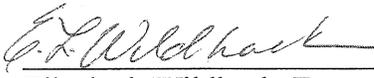

Lynn Kay

Acknowledged by Elaine Kapusta's attorney and Guardian *ad Litem*:

1/7/2020
Date Signed


Laurie L. Kirkland, Esq.
Attorney for Elaine Kapusta

1/7/2020
Date Signed


Elizabeth Wildhack, Esq.
Guardian ad Litem

VIRGINIA :

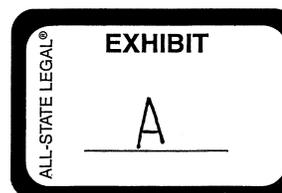
IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PHILIP KAPUSTA,)
)
 Plaintiff,)
)
 v.) Case No. 2018-11871
)
 ELAINE MAE KAPUSTA,)
)
 Respondent,)
)
 and)
)
 LYNN KAY,)
)
 Defendant.)

**FINAL ORDER OF APPOINTMENT
OF GUARDIAN, CONSERVATOR, AND TRUSTEE**

THIS CAUSE CAME before the Court on a joint motion of all parties for the entry of a final order and the appointment of a guardian and conservator for Respondent Elaine Kapusta (“Ms. Kapusta”) pursuant to Virginia Code section 64.2-2000 *et seq.* At the hearing convened, after due consideration of the pleadings and evidence in this case, the report of Bruce Lessin, M.D., and the report of the Guardian *ad litem* for Ms. Kapusta, the Court determined the need for a guardian and conservator for Ms. Kapusta.

In making that determination, the Court has considered (i) the limitations of Respondent; (ii) the development of Respondent’s maximum self-reliance and independence; (iii) the availability of less restrictive alternatives, including advance directives and durable powers of attorney; (iv) the extent to which it is necessary to protect Respondent from neglect, exploitation, or abuse; (v) the actions needed to be taken by the guardian and conservator; (vi) the suitability



of the proposed guardian and conservator; and (vii) the best interests of Respondent. Based on the evidence presented at the hearing, this Court finds by clear and convincing evidence that:

1. Ms. Kapusta currently resides at 4136 North River St., McLean, Virginia 22101.

Pursuant to Virginia Code section 64.2-2107, this Court has jurisdiction to appoint a guardian and conservator for Ms. Kapusta because Virginia is her “home state” under Virginia Code section 64.2-2105.

2. Ms. Kapusta is an 82-year-old female, and her birth date is December 30, 1937.

3. Ms. Kapusta currently suffers from mild to moderate dementia of the Alzheimer’s type, which has resulted in reduced cognitive function. Although Ms. Kapusta currently is able to perform her own basic activities of daily living, she cannot answer questions regarding the day, date, month, year; she cannot perform simple mathematical calculations; she cannot identify the current president; and she has been found to be unlikely to learn new tasks. For these reasons, Ms. Kapusta currently is incapable of making reliable decisions regarding her health care, food, clothing, shelter, finances, or the administration of her property.

4. By virtue of her condition, Ms. Kapusta is unable to care for herself without assistance and support, manage her affairs, or make rational decisions regarding her health, safety, and treatment needs.

5. Due to the limitations imposed by her current condition, Respondent is incapacitated and in need of a guardian and conservator. A guardian and conservator can facilitate the development of Respondent’s maximum self-reliance and independence while protecting her from neglect, exploitation, or abuse.

6. The Parties have agreed that Lynn Kay is an appropriate person to serve as the guardian for Ms. Kapusta as she has been serving as Ms. Kapusta’s agent under a power of

attorney and advance medical directive for the past several years. The Parties further believe that Cary Z. Cucinelli, Esq. is an appropriate person to serve as conservator for Ms. Kapusta. Ms. Cucinelli is an attorney in private practice before the Bar of this Court, with extensive experience as a fiduciary, and specifically as a guardian and conservator, with offices located at 4084 University Drive, Suite 202A, Fairfax, Virginia 22030.

7. The parties have complied with Subsections B, C, and D of Virginia Code section 64.2-2004. Ms. Kapusta was served with the Petition on August 10, 2018, and she was provided with a copy of the Notice of Hearing and Order Appointing a Guardian *ad Litem* by Elizabeth L. Wildhack, Guardian *ad Litem*. These actions satisfy the service requirement as set forth in Section 64.2-2004(B).

8. Ms. Kapusta currently is unmarried, her husband having predeceased her, and she has two children, Petitioner Philip Kapusta and Defendant Lynn Kay. On or about December 30, 2014, Ms. Kapusta executed a General Power of Attorney and a Durable Power of Attorney, appointing Lynn Kay as her agent and Philip Kapusta as her successor agent under both documents.

9. No guardian, committee, or conservator has been appointed or is currently acting, in this state or elsewhere, for the Ms. Kapusta.

10. Ms. Kapusta's native language is English.

11. Ms. Kapusta's current income, assets, and debts are set forth in the report of the Guardian *ad litem* filed with this Court.

12. The current plan of care for Ms. Kapusta is retention of a care manager to ensure sufficient assistance to allow her to safely live in her house until the care manager believes that living in the home, with 24/7 care provided by her daughter, is no longer safe or appropriate.

13. The Parties do not believe that Ms. Kapusta's attendance at any hearing would be detrimental to her health, care, and safety, but it is unlikely that Ms. Kapusta would understand or appreciate the nature of the proceedings even if she did attend.

WHEREFORE, it is hereby:

ORDERED that Respondent Elaine Kapusta is adjudicated and found to be incapacitated to such an extent that she is unable to care for herself, make medical decisions, manage her estate and to understand her debts or pay them as they come due, and to enter into contracts for herself; and it is further

ORDERED that Lynn Kay is hereby appointed the Guardian of Elaine Kapusta, with all powers granted, and duties conferred upon a Guardian pursuant to Virginia Code section 64.2-2019, except that the Guardian shall have no power to hire, manage, or terminate any caregiver hired by the Conservator for Ms. Kapusta, and the Guardian shall continue to serve in that capacity until further Order of this Court; and it is further

ORDERED, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Standards, as defined under 45 C.F.R. Parts 160 and 164, the Guardian shall be designated Elaine Kapusta's "personal representative" to act on her behalf and "treated as the individual" for purposes of disclosure, receipt, and inspection of any medical records and health information; and it is further

ORDERED that neither Philip Kapusta nor any care manager for Elaine Kapusta shall be denied access to Elaine Kapusta's protected health information and medical records;

ORDERED that the Guardian, shall, only after consultation with the Conservator and any care manager hired by the Conservator, have the power and discretion to exercise complete control and custody of the person of Elaine Kapusta, to provide for her admission or retention,

even if contrary to her expressed wishes, to any nursing facility, convalescent home, continuing care community, adult care residence, private home, or any other residential or therapeutic placement, in any jurisdiction; and it is further

ORDERED that any and all durable powers of attorney, health care powers of attorney, and advance medical directives executed by Elaine Kapusta are hereby terminated and no longer in effect pursuant to Virginia Code section 64.2-1606(B); and it is further

ORDERED that Cary Z. Cucinelli, Esq. is hereby appointed the Conservator of Elaine Kapusta, with all powers granted, and duties conferred upon a Conservator pursuant to Virginia Code sections 64.2-2021 and 2022, and she shall continue to serve in that capacity until further Order of this Court; and it is further

ORDERED that Lynn Kay's resignation as trustee of the Elaine Mae Kapusta Revocable Trust Agreement dated December 30, 2014 ("the Trust") is hereby accepted; that Philip Kapusta's resignation as successor trustee of the Trust also is hereby accepted; and that Cary Z. Cucinelli, as Conservator, is hereby appointed the Trustee of the Trust; and it is further

ORDERED that Cary Z. Cucinelli shall receive compensation for her work as Conservator as approved by the Commissioner of Accounts; and it is further

ORDERED that Cary Z. Cucinelli shall send a report on Elaine Kapusta's financial situation to Philip Kapusta and to Lynn Kay on a quarterly basis; and it is further

ORDERED that the Conservator shall designate and hire a care manager or other caregiver to assist Elaine Kapusta; and it is further

ORDERED that so long as Lynn Kay provides 24/7 care for Elaine Kapusta and so long as the care manager hired by the Conservator believes that it is safe for Elaine Kapusta to

continue living in her house with Lynn Kay, then the Conservator shall pay Lynn Kay an annual salary of \$90,000; and it is further

ORDERED that the Conservator shall reimburse Philip Kapusta for his attorneys' fees and costs incurred in this matter up to \$70,000; and it is further

ORDERED that the Conservator shall ensure that the law firm of Blankingship & Keith, P.C. is paid any fees and costs owed for its representation of Elaine Kapusta in this matter; and it is further

ORDERED that the Conservator shall review Ms. Kapusta's accounts for the last five years, and, for any documented gifts that Elaine Kapusta made to Lynn Kay but not to Philip Kapusta, the Conservator shall make a lump sum gift from Elaine Kapusta's estate to Philip Kapusta in the amount necessary to equalize the gifts received by Lynn Kay and Philip Kapusta during those years; and it is further

ORDERED that the Conservator is authorized to enter any safety deposit box rented in the name of Elaine Kapusta and to do as she deems appropriate with the contents of any such box; and it is further

ORDERED that the Conservator shall not be permitted to sell, encumber, and/or transfer Elaine Kapusta's right, title, and/or interest in the real estate located at 4136 North River Street, McLean, Virginia 22101 without further order of the Court; and it is further

ORDERED that the Conservator expressly is granted the authority to sell, encumber, and/or transfer Elaine Kapusta's right, title, and/or interest in the real estate located at (1) 4132 N. 21st Road, Arlington, Virginia; (2) 4133 N. 21st Road, Arlington, Virginia; (3) 4137 N. 21st Road, Arlington, Virginia; (4) 4144 N. 21st Road, Arlington, Virginia; (5) 4145 N. 21st Road,

Arlington, Virginia; and (6)1451 Wasp Lane, McLean, Virginia. The Conservator shall have any sales contracts reviewed by the Commissioner of Accounts prior to any sale; and it is further

ORDERED that the Guardian and the Conservator shall (i) to the extent feasible, encourage Respondent to participate in decisions, to act on her own behalf, to develop or regain the capacity to manage her own affairs, and, (ii) take into consideration the express desires and personal values of Ms. Kapusta, and it is further

ORDERED that given the nature of Elaine Kapusta's disability, and following appropriate consideration of the factors specified in Virginia Code section 64.2-2007, the Court does not deem appropriate any limitations on this guardianship or conservatorship other than as herein provided; and it is further

ORDERED that, pursuant to Virginia Code section 64.2-2011, Lynn Kay, shall give bond before the Clerk of Court in the amount of \$_____ without surety, conditioned according to law upon the faithful performance of her duties as Guardian of Elaine Kapusta; and it is further

ORDERED that, pursuant to Virginia Code section 64.2-2011, Cary Z. Cucinelli shall give bond before the Clerk of Court in the amount of \$_____ with surety, conditioned according to law upon the faithful performance of her duties as Conservator of Elaine Kapusta; and it is further

ORDERED that Elizabeth Wildhack, Esq. is awarded a fee of \$_____ for her service as Ms. Kapusta's Guardian *ad litem* and that, pursuant to Virginia Code section 64.2-2003(A), her fee shall be taxed as a cost of this proceeding, which Cary Z. Cucinelli, as the Conservator, is authorized to pay out of Respondent's estate. Upon entry of this order, Ms. Wildhack is released from any further service in this matter.

ENTERED this ____ day of _____ 2020.

Circuit Court Judge

HALE BALL
10511 Judicial Drive
Fairfax, Virginia 22030
Telephone: 703-591-4900
Facsimile: 703-491-5082

By: _____
Lucas J. Kline, VSB No. 78698
lkline@haleball.com
Counsel for Petitioner Philip Kapusta

ODIN, FELDMAN & PITTLEMAN, P.C.
1775 Wiehle Avenue, Suite 400
Reston, Virginia 20190
Telephone: 703-218-2156
Facsimile: (703) 218-2160

By: _____
David Gutkowski, VSB No. 72998
David.Gutkowski@ofplaw.com
Counsel for Defendant Lynn Kay

BLANKINGSHIP & KEITH, P.C.
4020 University Drive, 3rd Floor
Fairfax, Virginia 22030
Telephone: 703-691-1235
Facsimile: 703-691-3913

By: _____
Laurie L. Kirkland, VSB No. 75320
lkirkland@bklawva.com
Counsel for Respondent Elaine Kapusta

THOMPSON WILDHACK PLC
6045 Wilson Boulevard, Suite 101
Arlington, Virginia 22205
Telephone: 703-237-0095
Facsimile: 703-852-4386

By: _____
Elizabeth L. Wildhack, Esq.
Elizabeth@twplc.com
Guardian ad Litem for Respondent

SEEN AND AGREED

By:

Cary Z. Cucinelli, VSB No. 72102

cary@cucinelliger.com

CUCINELLI GEIGER PC

4084 University Drive, Suite 202A

Fairfax, Virginia 22030

Telephone: 703-481-6464

Facsimile: 703-991-0609

Proposed Conservator for Elaine Kapusta

WAIVER OF QUALIFICATION

VA. CODE §§ 64.2-500, 64.2-502

Court File No.

TO THE CLERK:

..... Virginia, Circuit Court

.....
NAME OF DECEDENT

.....
DATE OF DEATH

1. I/We, the executor(s) appointed by the decedent's will,
 I refuse the executorship
 I refuse the executorship in favor of the co-executor(s)

SIGNATURE OF EXECUTOR(S)

2. I/We, residual or substantial legatee(s) (persons to whom decedent willed personal property), or
 I/We, distributees of the intestate decedent's estate (relatives under Va. Code § 64.2-201; see also § 64.2-200),
decline to qualify on the estate and request appointment of

.....
NAME AND ADDRESS OF PERSON NOMINATED FOR APPOINTMENT

- as administrator, c.t.a. (if decedent left a will) or
 as administrator (if decedent did not leave a will)

SIGNATURE(S), LEGATEE(S)/DISTRIBUTE(S)

RELATIONSHIP TO DECEDENT

_____
_____
_____
_____

City County of State/Commonwealth of

Acknowledged, subscribed and sworn to before me this day of, 20

by
PRINT NAME OF SIGNATORY

.....
 CLERK DEPUTY CLERK
 NOTARY PUBLIC My commission expires
Registration No.

