



**CIVIL AND CRIMINAL REMEDIES
ELDER ABUSE**

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INTRODUCTION

When financial abuse of older adults is suspected, remedies (to correct the wrong or punish the perpetrator) can be sought under provincial laws (such as legislation governing property, guardianship, capacity, health, and social services), as well as federally, including under the *Criminal Code* of Canada. Civil proceedings can be commenced in addition to criminal proceedings and the two sets of proceedings can continue at the same time, or, civil remedies can be pursued alone as a means of recovering property, seeking restitution and obtaining damages.

Available civil and criminal remedies are often not well understood. The differences between the two procedural avenues and when one type of remedy may be more suitable than another will be explored as well as contextually why we need these remedies.

ELDER FINANCIAL ABUSE: OVERVIEW

According to the Canadian Department of Justice, financial abuse is the most commonly reported type of abuse against older adults.¹ However, the Department of Justice also commented on the difficulty in estimating the prevalence and incidence of elder abuse in Canada due to obvious factors associated with under-reporting.² Financial abuse can look like anything including improper use of joint bank accounts, forgery or abuse involving a Power of Attorney document, sharing an older adult's home without payment or sharing in expenses, misuse, appropriation, or theft of an older adult's assets, transfer of real property, ATM fraud and other.³ Often financial abuse is conducted by a family member upon whom the older adult is dependent and who is potentially influenced by or controlled and victimized.⁴ Financial abuse can also be inflicted by a

¹ Department of Justice, *Backgrounder Elder Abuse Legislation*, online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32716.html

² *Ibid.*

³ Government of Canada, Seniors Canada, *Facts on Financial Abuse of Seniors*, online: <http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=158>.

⁴ Ontario Provincial Police, *Tip Sheet on Abuse of Older Adults*, online: <http://www.opp.ca/ecms/files/250363255.6.pdf>

caregiver, service provider, or other person in a position of power or trust (where there is a power imbalance).⁵

According to the World Health Organization, “elder abuse” is: “A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.”⁶

The National Initiative for the Care of the Elderly (“N.I.C.E.”) defines older adult financial abuse as, “Theft or exploitation of a person’s money, property or assets.”

Financial abuse is:

- misusing a Continuing Power of Attorney for Property (“CPOAP”) which is a legal document where a person gives another the legal authority to make financial decisions on the grantor’s behalf;
- stealing an older adult’s money, pension cheques, or possessions;
- committing fraud, forgery or extortion;
- sharing an older adult’s home without paying rent, or a fair share of the expenses;
- unduly exerting pressure on an older adult in order to:
 - Sell personal property
 - Invest or take out money
 - Buy alcohol or drugs
 - Make or change a testamentary document
 - sign legal documents that are not understand

⁵ Government of Canada, Seniors Canada, *Facts on the Abuse of Seniors*, online <http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=155>

⁶ http://www.who.int/ageing/projects/elder_abuse/en/

- Gift money to relatives, caregivers or friends
- Engage in paid work to bring in extra money.⁷

Indicators of financial abuse on an older adult include:

- changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without permission or consent;
- unexplained or sudden inability to pay bills;
- unexplained or sudden withdrawal of money from accounts;
- poor living conditions in comparison to the value of the assets;
- changes in banking patterns;
- changes in appearance;
- controlling spending;
- confusion or lack of knowledge about a financial situation and execution of legal documents;
- being forced to sign multiple documents at once, or successively;
- being coerced into a situation of overwork and underpay;
- unexplained disappearance of possessions (lost jewellery or silverware);
- changes in Power of Attorney (“POA”) documents;
- necessities of life denied or not provided by an attorney under a POA (shelter, food, medication, assistive devices)

- being overcharged for services or products by providers; or
- being denied the right to make independent financial decisions.⁸

The most frequent perpetrators of financial abuse on older adults are adult children, service providers, strangers, or even spouses (especially in the predatory marriage context where unscrupulous individuals prey upon older adults with diminished reasoning ability purely for financial gain).

Financial abuse is under-reported for several reasons, often because the older adult:

- feels shame or embarrassment having been victimized;
- is fearful of the perpetrator, or has a fear of the police or other authorities;
- is dependent upon the perpetrator for physical well-being;
- wants to protect the abuser, especially if a family member;
- feels that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is family or is a friend;
- feels guilty for becoming a victim, or feels blameworthy;
- can minimize, rationalize or deny the abuse altogether;
- may not even recognize the abuse;
- may not be able to report even if an existent desire to;
- may not have the physical ability to report; or

⁷ NICE – Tools for Preventing and Intervening in Situations of Financial Abuse, <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario>

⁸ NICE – Tools for Preventing and Intervening in Situations of Financial Abuse, <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario>

- may be suffering from dementia or lack of requisite mental capacity.

CIVIL & CRIMINAL REMEDIES

Once an abuse is reported or discovered, there are two avenues that can be followed in remedying elder financial abuse: either pursuit through civil courts (lawsuits between private parties) or through criminal courts (where an individual is charged under the *Criminal Code* by the Crown).

For a number of reasons, financial abuse of older adults does not always attract criminal charges. For reasons noted above, a victim may be unable or unwilling to extricate him/herself from the presence of undue influence and may refuse ultimately to report a loved one, or care provider to the police. This is especially true in circumstances where the older adult relies on the perpetrator for care and needed assistance.

In some cases, the police may even decline to investigate at all on the basis that such issues may appear not to be criminal in nature, but rather civil. However, as we seek to demonstrate there are several sections of the *Criminal Code* that may well be under-utilized due to this misperception that such matters are best suited to civil recourse rather than criminal.

While anyone can start a civil action (as opposed to relying on the Crown to press charges), there are still many barriers to achieve justice for victims. Often, civil remedies are only available to those who can afford the often cost prohibitive process. Civil litigation can potentially take many years which an older frail adult may not have the luxury of enjoying. Lawyers similarly are costly. The time commitment required in the civil litigation process therefore poses practical problems since older adults have limited time and often limited means. There is likely an under-reporting of abuse and we know this even from the abuse that we later see after death. In certain situations, if the elements can be met under an applicable section of the *Criminal Code*, it may well be more appropriate for criminal remedies to be explored and pursued.

CIVIL REMEDIES

Civil remedies are mainly about restitution, meaning placing the victim back into the place he/she would have been had the wrongful act never happened. In other words – to have the perpetrator pay back the money with punitive result (the payment plus punitive payment of money is called “damages”). While there may well be some element of restitution in criminal cases, the guilty perpetrator would likely be sentenced to jail or probation or some other punitive outcome there may not be any return of the money. In some civil decisions, courts have signalled their willingness to order custodial sentences where necessary, especially in breach of trust cases. Another remedy available to a civil court is to make a “declaration” that real property or a bank account for example, beneficially belongs to the older adult, where a the perpetrator wrongfully assumed control of it.

In a civil court case the plaintiff (the older adult or victim) must use evidence to prove on a “balance of probabilities” that the perpetrator caused the harm (i.e. more likely than not) rather than the criminal standard of “beyond a reasonable doubt”. This difference in evidentiary requirement is one way to determine which remedial route to take: if the evidence is not available to prove a crime occurred on the higher standard attributable “beyond a reasonable doubt”; then the civil route (with the lower standard) may well be more achievable.

Often the type of financial abuse seen by lawyers practicing civil litigation can be divided into two categories:

1. **Breach of fiduciary duty** by a substitute decision maker. For example, someone who is acting as an attorney, under a Power of Attorney for Property, or under a Continuing Power of Attorney for Property must fulfill certain ethical, moral and legal duties. That attorney’s actions are fiduciary in nature and are governed legislatively by the *Substitute Decisions Act*. A fiduciary’s actions are also governed by common law; and

2. An “inadvertent” transfer of assets whether money, or real property (houses, land, condos) by a vulnerable adult to another person, or the transferring of property into joint names or a “miscommunication” over a “loan vs. gift”. The perpetrator for example argues it was a gift, yet, the victim insists it was a loan.

Below is a summary of some of the remedies that a Court can order in financial abuse situations:

1. “Removal” of an Attorney under a Continuing Power of Attorney for Property

A *Continuing Power of Attorney for Property* (CPOAP) is commonly used to make sure that the financial affairs of a person are looked after at a time when that person (the grantor) can no longer look after his/her affairs alone, either temporarily, as agent, and/or permanently when decisionally incapable. Much to the surprise of many, the CPOAP is effective **immediately** upon execution **unless** there is a provision or “triggering” mechanism in the document itself which says that it will only come into effect on a certain date or upon a certain event, such as the incapacity of the grantor.

The powers granted to an attorney acting on behalf of an incapable person are **extensive**. An Attorney operating under a CPOAP has the power to **do anything** on behalf of the grantor that the grantor could do if capable, except make a Will. These powers are subject to legislative governance and various court-imposed conditions.

The *Substitute Decisions Act (the “SDA”)* particularizes the obligations and duties of an attorney under a power of attorney for property. The SDA includes the court procedure for holding an attorney accountable for its actions. As noted, elder financial abuse often involves the misuse of powers granted under a Power of Attorney document. A Court can order that the attorney be removed as an attorney and can prohibit the grantee from acting as an attorney under a POA.

2. Order to “Account” (Produce Evidence of How the Money was Spent)

Another civil remedy to address any money wrongfully taken by an attorney under a CPOAP is to order an accounting be provided tracking all transactions undertaken for the grantor, i.e., to provide financial documents and back-up to show how he/she was spending the money. That process is called an “accounting”. At the hearing of an accounting application under the *Substitute Decisions Act*, the civil court will consider the evidence and look at the accounts and the conduct of the attorney. Judges have broad discretion in an accounting application – they can make all manner of and inquiry into the conduct of the attorney. If it is found that the attorney failed to meet the obligations under the *Substitute Decisions Act*, it is open to the court to make a finding that there has been a breach of fiduciary duty.

3. Repay Money Improperly Taken

If the Court finds that an attorney under a POAP or CPOAP improperly took money from the grantor or did not pursue another who for example did not repay a “loan” to the older adult, or committed civil fraud on the older adult etc., the Court can order the repayment of those amounts, plus interest, and legal costs incurred.

4. “Set Aside” a Transfer of Title or Bank Account into Joint Names

Older adults may transfer real property into a joint tenancy with one or more of their adult children. Sometimes, this is a planning technique used to avoid estate administration tax on the theory that title to the parent’s property once dead automatically transfers to the adult child.

Older adults may also add their adult children to their bank accounts to permit their children to assist them with bill payments and other financial matters. Joint bank accounts with ‘rights of survivorship’ are also used as an estate planning tool by individuals who wish to avoid paying probate taxes and/or fees of professionals who draft Wills. “Rights of survivorship” simply means that when one joint owner dies the entire asset is now owned by the survivor.

Obtaining “rights of survivorship” on a joint bank account can be as simple as checking off a box on the application form. This is where the trouble arises. An older adult opens a joint account with one of their adult children. The older adult dies. The adult child who is jointly named on the bank account says ALL of the money is theirs now, that’s what Mother wanted. Other children cry foul and say no Mother wanted the money to be split between ALL of the children. That’s where the lawyers come in. A civil court can make a declaration that the money or property belonged to Mother solely and order that title be returned and/or that any money taken be returned as well.

COURT DECISIONS HIGHLIGHTING CIVIL REMEDIES

“Go-Karts for Mother”⁹

In one rather sad case a mother appointed her two sons as joint attorneys under a CPOAP. However, she decided not to tell one of her children attorney’s that he was appointed as her attorney (or forgot to do so).

The son who knew he was an attorney, and had access to all of his mother’s assets, used her life savings to invest in rather dubious business ventures. He thought it would be a good idea to invest his elderly mother’s hard earned money into a go-kart business. By the time the other son figured it out, the mother’s assets were depleted by almost \$2 million.

The Court removed the son as the attorney and ordered that he provide an accounting for the money. The Court also had this to say: *“Mary is the embodiment of an individual who needs protection of the court otherwise she is a pawn in the investment schemes of her son. . . . The fiscal stewardship of [the son] has been a disaster for his mother. He has literally blown through at least \$2,000,000. If there was ever a case for removal of an attorney this is it. It will prevent the further haemorrhaging of his mother’s assets.”*

The son was also ordered to pay over \$25,000.00 in legal costs.

⁹ *McMaster v. McMaster* 2013 ONSC 1115

“Of Course Mom Wanted Me to Have Her House”¹⁰

An adult daughter convinced her widowed mother to transfer the title of her house (her only significant asset) into joint ownership with her daughter. On the mother’s death, the daughter claimed that she was the sole owner of the house.

However the mother’s Will said that two of her grandchildren were to receive portions of the proceeds of the sale of her house upon her death. The daughter ignored the Will, sold the mother’s house (without notifying her family until the day the sale closed), and kept the proceeds for herself.

She argued that the money was hers, as she was the sole owner, and she had no obligation to give any money to the grandchildren. The Court found otherwise.

While the evidence showed that the mother wanted the daughter to be “looked after” and to receive *some* of the proceeds from the sale of the house – the Will clearly stipulated that the grandchildren were to receive a portion of the proceeds as well.

The Court found that the mother had not “gifted” the house to the daughter but that the daughter was merely holding the house in trust for her estate.

“The Son Who Tried to Steal His Mom’s House”¹¹

Shortly after his father’s death a son took his widowed mother to a registry office. With the assistance of a conveyancer the title to his mother’s house was transferred to the son and his mother as joint tenants.

The mother thought that she was attending the court house so that her son could sign a document which would give him the power to look after her as she grew older (or in other words a POA). Also, the son was living with the mother at this time, and she was relying more on him after the death of her husband. Not only was the mother grieving the loss of her husband at this point, her first language was Italian and her

¹⁰ *Mroz v. Mroz* 2015 ONCA 171

¹¹ *Servello v. Servello*

comprehension and reading in English was limited so she did not understand the documents she was signing.

Three years later, the mother attended the registry office with one of her daughters and had a title search completed on her house. This was the first time that she became aware that her son had acquired a right of survivorship in her home. The son refused to restore title to the property to his mother. She sought an order from the court restoring her as the property's sole owner.

The Court held that the transfer of the property into joint tenancy should be set aside and that the mother should be restored as sole owner, finding that:

“...the natural influence as between a mother and son exerted by those who possess it to obtain a benefit for themselves, is undue influence.”

“This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. Rosina [the mother] did not receive independent legal advice, and accordingly the two deeds which gave Antonio [the son] an interest in the land should be set aside on this basis as well.”

The transfer was set aside (meaning it was no longer valid) as the mother was vulnerable to the influences of her adult son and she did not receive the required independent legal advice before the transfer took place.

“The Crooked Lawyer”¹²

The deceased husband and his surviving wife were founders of an extensive Canadian art collection (the McMichael Collection) donated to the province of Ontario. Both husband and wife had Wills that left their entire estate to the surviving spouse, but if there was no surviving spouse, the residue of the estate was to go to the McMichael Collection.

¹² *Zimmerman v. McMichael Estate* 2010 ONSC 2947

The very night her husband died, Mr. Zimmerman, a friend of the couple who was a lawyer and a former crown prosecutor, took the widow, Mrs. McMichael who was 81 at the time, to his parents' house to console her and sign power of attorney documents appointing himself as her sole attorney for property.

Mrs. McMichael was frail and required constant nursing assistance. She had no immediate family and her health deteriorated to the point that she could no longer remain in her home and was moved to a seniors' residence, where she remained until her death. Up until her death, Mr. Zimmerman had full control over all of her assets as her attorney under the POA.

After Mrs. McMichael's death, her niece and her husband successfully went to Court for a declaration that the Power of Attorney was void and an order that required Mr. Zimmerman to explain or account for his financial dealings with Mrs. McMichael's property.

During the hearing, the Court found that the financial accounts presented by Mr. Zimmerman were inadequate, incomplete and in many respects false.

It was found that Mr. Zimmerman had taken money to cover such things as expensive dinners, new clothing, limousines, sailing trips to Bermuda, and trips to New York. It was also found that he had used Mrs. McMichael's BMW, charging any/all expenses to her, and had taken her expensive art collection to adorn the walls of his own home, even "losing" one piece of art.

The Court found that Mr. Zimmerman's conduct fell well below the standards expected of an attorney. He had paid himself over \$350,000.00 CDN and over \$85,000.00 USD from Mrs. McMichael's assets.

The Court concluded that he was required to repay the amounts that he had taken, together with interest from the date of each taking. However, Mr. Zimmerman died shortly after this court case and it is unknown if the money was ever recovered.

CRIMINAL REMEDIES

The Canadian *Criminal Code*¹³ plays a role directly and indirectly, in protecting older adults from financial abuse and exploitation. Select criminal offences can be particularly useful in deterring and penalizing perpetrators of financial abuse.

While the *Criminal Code* does not provide for the specific offence of "elder abuse", or "financial abuse" there are however certain offences under which such a perpetrator could be charged, including under:

1. **Section 331: Theft by a Person Holding a Power of Attorney;**
2. **Section 322: Theft;**
3. **Section 336: Criminal Breach of Trust (Conversion by Trustee);**
4. **Section 366: Forgery;**
5. **Section 346: Extortion;**
6. **Section 386-388: Fraud;**
7. **Section 215: Failure to Provide the Necessaries of Life; and**
8. **Section 219: Criminal Negligence**

Notably, the sentencing provision (section 718) introduced in 2013 now provides our criminal courts with additional factors that can be considered to increase the severity of sentencing where appropriate, when the victims of these crimes are older and vulnerable.

Section 718 of the *Criminal Code* references a wide range of aggravating factors which can be considered by the Court in determining appropriate sentencing principles. Longer sentences are warranted if the crime was motivated **by age or disability**, and

¹³ RSC 1985, c. C-46

evidence exists that the offender abused a position of trust or authority in relation to the victim.

***R. v. Bernard* – Surrey, BC – Section 380 (1) (a) (Fraud over \$5000)**

Joseph Bernard¹⁴ was convicted of defrauding a 79 year old man of over \$10,000.00 by making unauthorized withdrawals of \$500.00 a day from a visa card. The older adult had no surviving children and his wife had just been moved into a care home the previous year. He also suffered from early stages of dementia and other forms of “degenerative mental conditions” at the time of the offence. The fraudster came to the victim’s house asking to wash his windows and eave troughs. After that the older adult offered to allow the fraudster to live in his house in exchange for assistance around the house and other tasks. The fraudster took on the role of “caregiver” of the older adult. It was in this role that he defrauded his victim. Not only did he steal from the older adult, at the time the fraud was discovered by the older adult’s sister-in-law, the house was in a “deplorable state”, there was no food in the refrigerator, and the older adult was malnourished and had to be taken to the hospital.

The Crown sought a jail sentence of 4.5 years. In determining the appropriate sentence, the Court noted:

[32] Section 718.2(a)(iii) and (iii.1) provide that a sentencing court consider evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, and evidence that the offence had a significant impact on the victim, considering their age or other personal circumstances, including their health and financial situation, to be aggravating factors. . . .

[47] The present case involves a breach of trust of certainly a very high nature. Mr. Crouter [the older adult] had confidence in Mr. Bernard [the fraudster], not only to live in his house and share living space without defrauding him, but to

¹⁴ 2015 BCPC 107.

assist him in the necessary tasks which were difficult or impossible for Mr. Crouter to do himself. When he was "befriended" by Mr. Bernard, Mr. Crouter was living alone after his wife had recently moved into a care home. His only family support was from the family in Calgary. His physical and mental health were failing, and it appears from Mr. Bernard's own evidence that Mr. Crouter was not able to properly physically care for himself. Mr. Bernard purported to be Mr. Crouter's friend and caregiver at a time when Mr. Crouter desperately needed both. Mr. Crouter invited Mr. Bernard into his home in shared quarters and Mr. Bernard assisted Mr. Crouter to drive him to various visits to his wife and run other errands. He was to make sure that Mr. Bernard was taking his insulin. Mr. Bernard convinced Ms. Etchison [the sister-in-law] that he was a benevolent caregiver and that he had had prior experience with assisting other elderly persons in need.

The Court considered all of the principles of sentencing and concluded that the primary factors involved in this case were the "denunciation" of the conduct and "general deterrence so that others do not participate in similar activities". The Court noted that the perpetrator "preyed upon a vulnerable, isolated, elderly victim and a significant sentence [was] required to reflect society's abhorrence for such conduct".¹⁵ The fraudster was sentenced to **4 years** in custody.¹⁶

R. v. Kaziuk - Oakville, ON - Section 334 (Theft), 380 (Fraud), 331 (Theft by Person Holding a Power of Attorney)

This case¹⁷ is interesting because although section 331 was enacted as long ago as 1984, this is one of only a few reported decision in Canada citing s. 331 in the context of abuse of older adults, and in the end, the accused was not even charged under 331. Instead, he was charged under the regular theft and fraud provisions. That said, Justice Baldwin "*found that the s.331 offence had been proven by the Crown beyond a*

¹⁵ 2015 BCPC 107 at para. 65.

¹⁶ 2015 BCPC 107 at para. 66.

¹⁷ 2011 ONCJ 851

reasonable doubt" and that even though the accused was not charged with this offence it was an "*aggravating sentencing factor pursuant to s.725(1)(c) of the Criminal Code*".

The facts of the case are unfortunately becoming more commonplace and of an increasing societal concern. The accused, Mr. Kaziuk, was the only child of Ms. Kaziuk, a widow who was 88 years old at the time of trial. When her husband died a few years earlier, Ms. Kaziuk held assets and property well in excess of one million dollars; yet, at trial she was penniless and living in a homeless shelter. Her son had mortgaged her various properties under a Power of Attorney for Property. He subsequently defaulted on the mortgages and Ms. Kaziuk lost everything.

The Crown sought a total sentence of only 3-4 years' incarceration. However, Justice Baldwin sentenced Mr. Kaziuk to the maximum 10 year sentence for theft over \$5000.00, and ordered a concurrent 10 year sentence for fraud. Baldwin J., made the following further comments in the sentencing decision:

This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim....The victim was his elderly Mother who was extremely vulnerable to him as her only child. ...Mr. Kaziuk would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could ... In jail, this offender will be better off physically than his own Mother. He will be sheltered, fed regularly and kept warm.

Mr. Kaziuk appealed. The Court of Appeal upheld the conviction, but determined that the sentence proffered "was excessive" having regard to the fact that the trial judge referenced in the sentencing considerations another offence that was not proven at trial, and "*having regard to sentences imposed in similar cases, and the fact that the appellant had some 39 months left to serve on a prior offence.*"¹⁸ The Court accordingly reduced the 10-year sentence to 8 years, but in doing so, observed, "[w]e agree with the

¹⁸ *R v. Kaziuk* 2013 ONCA 217

trial judge's observations about the offender." Kaziuk sought leave to appeal to the Supreme Court of Canada but it was not granted.¹⁹

R. v. Taylor – Burlington, ON - Section 380 (1) (Fraud)

The case of *R. v. Taylor* is another notable example of an abuse of trust and an aggravating factor considered in sentencing.²⁰ Ms. Dokaupé, now deceased, was a frail, elderly woman who suffered a number of physical challenges that limited her mobility and left her vulnerable. She employed a caregiver whom she relied upon for her daily needs. At the caregiver's suggestion, Ms. Dokaupé executed a power of attorney for property in her favour. Ms. Dokaupé also executed a new Will that appointed the caregiver as executor. One year later, the caregiver used the attorney for property to obtain a bank card for Ms. Dokaupé's savings account. She then drained the bank account of \$126,000, leaving only \$17,000. The caregiver used that money for her own benefit.

The caregiver subsequently left Ms. Dokaupé's employment, and when Ms. Dokaupé's new caregiver read Ms. Dokaupé's bank statements, she told Ms. Dokaupé what she saw and called the police. The police charged the caregiver with fraud and obtained expert reports confirming that Ms. Dokaupé was capable of managing her property throughout the period in question, and during her discussions with police. Unfortunately, Ms. Dokaupé died before the trial took place. In her absence, the Crown relied on Ms. Dokaupé's witness statements which had been recorded by the police. The judge accepted Mrs. Dokaupé's evidence and the expert's evidence and sentenced the accused to **21 months in prison**.

The caregiver appealed her conviction on the grounds that Ms. Dokaupé's recorded statements were hearsay and inadmissible, and on the basis of mitigating factors that should have reduced the severity of the sentence. In dismissing the appeal, Justice Rosenberg wrote:

¹⁹ *R v. Kaziuk* 2013 CanLII 64666 (SCC)

²⁰ *R. v. Taylor*, 2012 ONCA 809

...this was a serious offence. The appellant voluntarily placed herself in a position of trust in relation to the complainant. She became her attorney and the executor of her estate. The frail, elderly complainant was completely reliant on the appellant. This was not a one-time act but a planned and deliberate fraud committed over many months by someone whom the complainant looked upon as a friend. The appellant stole and then spent over \$126,000, almost the complainant's entire life savings. In such a case, the paramount objectives of sentencing must be deterrence and denunciation, and they cannot be adequately met by a conditional sentence.

R. v. Cousineau – Vancouver, British Columbia – S. 380(1) (Fraud)

The British Columbia Court of Appeal granted leave to appeal the sentence of Mr. Cousineau, who was convicted of three counts of fraud under section 380(1), and was sentenced to 18 months in jail and two years' probation.²¹ The advanced age and vulnerability of his victims was considered as an aggravating factor in the court's sentencing.²² Mr. Cousineau was employed by a seniors' facility to market the residence. On three occasions he met with potential residents and pocketed their rent deposits. In addition to the penal sentence, the court also ordered Mr. Cousineau to repay \$7,357.00 and to pay victim surcharges in the amount of \$300.00.

Mr. Cousineau's appeal related only to the monetary components of his sentence. Interestingly, leave appears to have been granted on the basis of a technicality. Mr. Cousineau was self-represented on his application for leave to appeal. The Crown took the position that his appeal lacked merit, and the Court agreed. However, the Crown neglected to request an order refusing leave to appeal, so leave was granted.²³ However no appeal decision has been reported.

R v. Davy – Orillia, ON – Section 215 (Failure to Provide Necessaries of Life)

²¹ R. v. Cousineau, 2013 BCCA 289

²² R. v. Cousineau, 2013 BCSC 947 at 11 and 25.

²³ R. v. Cousineau, 2013 BCCA 289.

This case from **Orillia, Ontario** involved a particularly heinous crime. A daughter and son-in-law were charged in 2011 and convicted in 2015 of failing to provide the necessities of life to her elderly and vulnerable mother (s.215). The mother lived with her daughter and son-in-law and she suffered from severe dementia and from other serious medical conditions and was incapable of making personal care (and other) decisions for herself.

When the police received a call to the house they found the overpowering smell of cat urine, the presence of filth and feces, and the entire house was in complete squalor. The mother was found naked on a bare mattress in room with blacked out windows, covered in her own vomit. She looked like a skeleton covered with skin. When examined by health care professionals she was dehydrated, emaciated, anemic, and suffered from internal bleeding and had a fractured right hip. She died shortly thereafter at the age of 77.

The daughter and son-in-law had looked after the mother for 8 years and were attorneys under a POA for Personal Care for the mother. They had refused all help to look after the mother and made it very difficult for those who wanted to help (community care personnel etc.) to find her and refused to allow them into the house.

Because of the mother's ill health she could not provide for herself. She was unable, by reason of her severe dementia and physical diseases, to withdraw herself from their charge – the daughter and son-in-law were responsible to provide the mother with the necessities of life, food, water, shelter, adequate care, medical treatment of health conditions requiring treatment and protection from harm. It was clear that they failed to provide these necessities of life and they were each sentenced to 12 months in jail.

The Court had this to say: *This is a case of elder abuse. Denunciation and deterrence are the paramount sentencing considerations in elder abuse sentencing particularly in a case such as this where [the mother] suffered from severe dementia and was vulnerable.*

R. v. Hooyer – Simcoe, Ontario – S. 331 (Theft by Person Holding a Power of Attorney) and s. 380 (Fraud)

A long-time family friend of an older adult couple was charged and convicted of theft and fraud contrary to sections s.331 (theft by person holding a power of attorney) and 380 (fraud).

Hooyer had helped the couple with chores around the house, drove them to appointments etc. The husband developed dementia and was moved into long term care facility. The wife was his attorney for property until she died. Hooyer was the substitute attorney for property and the named residual beneficiary in the couples wills. After the wife died, Hooyer assumed control over the husband's property under the POA. Over the course of 7 years he moved into their home, purchased a \$37,000.00 Hummer for himself, spent \$15,000 on a Mustang for a friend and spent the rest of the husband's money on various daily expenses totalling thousands of dollars.

By the time the long term care facility and the bank called the police in 2011 the husband was left with \$18.00 in his bank account, \$13,000 in back taxes on his home and \$16,000 owing to the facility. In total Hooyer stole \$378,552.67 of the husband's assets and investments. He also defrauded Veteran's Affairs Canada (VAC) of over \$2000.00 as he submitted invoices from the facility to VAC claiming partial reimbursement and then kept the money himself.

At trial, Hooyer argued that no laws were broken because there were no limitations listed on the POA and that the husband told him he could use the money as if it were his own. Therefore he did not have the requisite mental intent to commit the offence as he honestly believed he was entitled to do what he did. The Court was not buying this. An attorney is a fiduciary with fiduciary duties and obligations that he should have known of his responsibilities. The Court found Hooyer knew the assets belonged to the husband when he used them for his own benefit.

On the theft charge he was sentenced to **2 years less a day** and ordered to pay \$378,552.67 in restitution to the husband's estate (the husband died in 2013). On the

fraud charge he was sentenced to **6 months** in prison to be served concurrently with the theft charge and ordered to pay full restitution to VAC. His appeal of his conviction and sentences was dismissed.

***R. v. Curreri* – Toronto, Ontario – S.380 (1)(a) – Fraud over \$5,000**

A son was charged under S.380 (1)(a) for committing fraud over \$5,000.00 against his 96 year-old father. The son fraudulently transferred and mortgaged 8 properties in Toronto and Ajax owned by his father. The fraud came to light when the father mentioned to his daughter that he was considering selling one of his properties to cover his funeral expenses and any estate taxes and asked his daughter to check to see if the property was in his name alone or was it held jointly with his deceased wife. The daughter and father were shocked to learn that all of his properties were in strangers' names and mortgaged to persons unknown. They went straight to the police.

The son was assisted in his fraud by a legal assistant at a real estate law firm. Both were found guilty in June 2016 – unfortunately no sentencing decision has been released yet. The Law Society also disciplined a lawyer for being duped by the son and the assistant and admitted to professional misconduct and was fined \$25,000.00.

***R. v. Reynolds* – Victoria, British Columbia – Section 322 (Theft)**

A daughter stole over \$300,000 from her elderly mother's bank account from 2009-2013.²⁴ She did this after her mother gave her access to her bank account to pay some of her bills. From here the daughter took over all of her mother's finances. The mother trusted her completely. As the daughter took the money out in cash (up to \$10,000 a month) there was no way to trace how the money was spent. The daughter had various explanations including that she spent it on her cocaine addiction, trips, and shopping for lingerie. Shortly after being informed of the theft the mother was admitted to the hospital for heart problems attributed to stress. She died before sentencing was completed. The daughter pled guilty to one count of theft of monies and was sentence to **30 months** incarceration

R. v. Bruyns – Oakville, ON – S. 322 (Theft), S. 380(1) (a) (Fraud over \$5000), and S. 336 (Criminal Breach of Trust)

A daughter was charged with three offences.²⁵ The first two charges allege that, being entrusted with a Power of Attorney for Property of her father, she (1) stole money exceeding \$5000 and 2) defrauded him of money exceeding \$5000. The third charge alleges that, being the trustee of money for her father's benefit, she converted money to a use not authorized by the trust, contrary to section 336. (It is not clear, once again, why she was not charged under s.331, Theft by a Person Holding a Power of Attorney.)

The daughter had used her father's money to pay her own personal bills which caused him to default on payments to the long term care facility where he was residing. That facility took no steps against him however, as the daughter repaid the entire amount after the charges were laid. The question before the court was whether the daughter took the money with an "honest but mistaken belief" that she was entitled to loan his money to herself in these particular circumstances. The POA document had a clause that stated:

"My attorneys shall also be authorized to make expenditures on my behalf for the purpose of making gifts or loans to my friends and relatives . . .if, in the absolute discretion of my attorneys, they have reason to believe that I would have made such gifts or loans if I were capable of doing so personally".

The daughter believed her father would have loaned her the money if he was mentally capable.

The Court disagreed. When the father had loaned her money in the past it had not caused him to go into debt or to default on his other financial obligations, unlike the current "loan" to the daughter. Past loans also did not put him at risk of being denied any services, such as those that the long term care facility provided. There was no

²⁴ R. v. Reynolds 2016 BCPC 69

²⁵ R.v. Bruyns 2016 ONCJ 207

reason to believe that the father would have made the loan if he were capable of doing so personally.

Furthermore the Court agreed with the Crown's argument that the daughter had breached her fiduciary and statutory duties under the *Substitute Decisions Act*, 1992 (section 32 and 66). The Court found that the Crown had proven beyond a reasonable doubt all of the essential elements of the offences charged except there was a reduction in the value of the money taken. Therefore she was found guilty of theft and fraud *under* \$5000 (instead of over). And she was found guilty of criminal breach of trust.

She was sentenced to a suspended sentence with probation for 18 months and terms of her probation required that she could no longer act as an attorney for her father.²⁶

CONCLUSION

As elder financial abuse continues to exist, the public, the police, the community and those involved with older adults must be aware of its devastating effects and how important it is to keep a watchful eye out for older family members, neighbours, and acquaintances. Several remedies exist to address elder financial abuse once it is detected or reported, but many may be under-utilized, unknown or simply unavailable to some. In certain instances, civil remedies will be more appropriate, especially where the evidence cannot prove all elements of a criminal charge beyond a reasonable doubt. The lesser civil burden of proving the wrong on a balance of probabilities will be more easily reached. However, where the elements of a criminal charge can be met by the evidence, criminal courts may be better equipped to deal with the abuse, especially when the victim may lack the resources or ability to advance a claim in civil courts.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance and is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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²⁶ 2016 ONCJ 527