

Fraud & Scams in Wills, Estates and Powers of Attorneys

Presented by Kimberly A. Whaley and Bryan Gilmartin –
WEL Partners

Association of Certified Forensic Investigators of
Canada

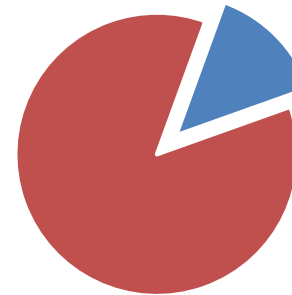


Overview

- Demographics
- Consent & Capacity concerns
- Elder Abuse including financial abuse and abuse under Powers of Attorney
- Civil & Criminal Responses to Abuse
- Recent Scams & Trends impacting older and vulnerable adults.

Canadian Demographics

- Over **7.5M** adults over the age of 65 representing close to **20 %** of the total Canadian population
- Stats Canada estimates that by 2031, **1 in 4** Canadians will be **over 65**



20%
POPULATION

+65

Cognitive Decline/Impairment

- Dementia is the **8th leading** cause of death
- Alzheimer's Canada estimates that over **600k** Canadians are living with dementia
- By 2030: close to **1 million**
- 2050: over **1.7 million**
- **Risk of dementia doubles at age 85**
 - From 12.4% at 80-84 to 24.6%



Capacity Generally

Adults - **presumption of capacity:** all adults are deemed or presumed capable of making decisions

- No 'one size fits all' determination for requisite capacity
- Generally, determined on a 'case-by-case' basis and in relation to a particular task, decision, and at a specific moment in time

Standards to be applied

Capacity is:

- **Decision-specific** – an individual may have capacity for one unique task but not for another
- **Time-specific** – the reality of good and bad days and certain times of day when capacity is a concern
- **Situation-specific** – stressful situations and places, ie. At home or in a doctor's office

Overarching Capacity Principles

Ball v. Mannin (1829):

- Is the individual “capable of understanding what they did by executing the deed in question when its general purport was fully explained to them?”
- Does the individual understand the **nature and effect** of the decision they are making, provided they have been given a proper explanation of that decision?

Signs of Diminished Capacity

- Can't understand info. relevant to decision
- Drastic life-style changes (self-neglect)
- Changes in hygiene, nutrition, or communication
- Disorientation as to time, place, or identity
- Problems with simple calculations
- Impaired thought process or memory loss
- Perception difficulties, delusions, or hallucinations



Elder Abuse

Includes:

- Domestic abuse, physical, mental or physical
- Predatory Marriages
- Withholding access to grandchildren
- Failing to provide the necessaries of life

Indicators or “Red Flags” of Abuse

- Changes in living arrangements
- Unexplained inability to pay bills
- Unexplained withdrawal of funds
- Changes in appearance or behaviour
- Changes in spending habits



Elder Financial Abuse

- Financial abuse is the most common form of elder abuse
- Often occurs at the hands of a family member or close friend
- Financial abuse exacerbated during the pandemic and beyond—due to socio-economic factors such as increased isolation/lack of access to supports

What Does Financial Abuse Look Like?

- **Misuse/abuse** of a Power of Attorney document, including fraudulent procurement of the powers and/or **forgery**
- Misuse, appropriation, or theft of an older adult's assets
- Improper use of bank accounts and/or joint bank accounts, including ATM fraud
- Sharing an older adult's home without payment of, or sharing in, expenses
- **Undue pressure** to sell property, invest/liquidate assets, make or change a Will, sign legal documents not readily understood or requested, gift money to caregivers/family/friends/strangers

Perpetrators known to the victim

- Spouses, whether married or in common law, and especially in context of **predatory unions/marriage**
- Adult children who may have various health, mental health, substance abuse, social isolation, employment and/or financial dependence issues
 - Rationalized as an automatic entitlement by virtue of their relationship as children of the victim

Undue Influence

The history of the parties' relationship is vital – indications of potential for undue influence:

- Whether testator is dependent on beneficiary for emotional or physical needs
- Social isolation
- Recent family conflict
- Recent bereavement
- Where a testator has made a new Will inconsistent with prior wills
- Simultaneous changes to other legal documents such as powers of attorney

Relevant Criminal Charges

- [Section 215](#) – Duty of Persons to Provide Necessaries of Life
- [Section 219](#) – Criminal Negligence
- [Section 264.1](#) – Uttering Threats
- [Section 265](#) – Physical Assault
- [Section 271](#) – Sexual Assault
- [Section 279](#) – Unlawful Confinement (Kidnapping)
- [Section 322](#) – Theft
- [Section 331](#) – Theft by a Person Holding a POA
- [Section 332](#) – Misappropriation of Money Held Under Direction
- [Section 336](#) – Criminal Breach of Trust
- [Section 342](#) – Theft, Forgery of Credit Card
- [Section 345](#) – Stopping Mail with Intent
- [Section 346](#) – Extortion
- [Section 366](#) – Forgery
- [Section 380](#) – Fraud
- [Section 423](#) – Intimidation

Sentencing Considerations

Sentencing Principles:

- Section 718.04 (“offence against vulnerable person”)
 - Abuse of a vulnerable person
- Section 718.2 (“other sentencing principles”)
 - Examples:
 - Abusing position of trust
 - Age and / or disability
 - Lengthier sentence

Scams Targeting Older Adults

Stranger scams including:

- Emergency/"Grandparent" scams
- Romance Scams
- Prize Scams
- Mortgage/Predatory Lending Scams

Elaborate Predatory Lending Scam

- Seniors, previously duped into various door-to-door HVAC equipment rental contracts are approached by people to help “consolidate their debt”
 - Unbeknownst to the homeowner, the fraudsters register liens and mortgages on title
- **The mortgages are usually for a one-year term with 25% interest** with monthly payments paid up front
- *CBC's Marketplace* investigated and found 40 mortgages connected to CCI, ranging from \$100k to \$550k and each with 25% interest terms

Sanders v. Canada's Choice Investments Inc.

- 78-year-old woman who lived alone with Alzheimer's in her semi-detached home on a modest income of \$60k/year was taken advantage of in a predatory mortgage lending scheme
- Commenced an action: mortgage was unconscionable, she was induced to sign through **fraudulent misrepresentations**, and she did not have capacity to consent
- Court granted an injunction to prevent the lenders from taking any steps to enforce the mortgage until trial
 - The law of equity will set aside contracts for unconscionability

Doctrine of Unconscionability

Uber Technologies Inc. v. Heller

- Relief is available on grounds of unconscionability where undue advantage is taken of weakness of intellect and in cases of more serious incompetence

Unconscionability requires only 2 elements:

1. An inequality of bargaining power; and
2. A resulting improvident bargain

“Equity allows courts to respond where the facts surrounding a transaction have undermined the traditional assumptions that underpin the common law of contract. Courts have regularly intervened to provide relief from improvident contracts where flaws in the contracting process led to unfair bargains.”

Understanding a Power of Attorney

What is a Power of Attorney?

- Legal instrument in writing – allows a person (the grantor) to appoint authority to another (the attorney) to perform acts on their behalf.
- Can be used for the management of **Property** or the management of **Personal Care**.

General Duties of an Attorney

An Attorney is a **fiduciary** with common law duties:

- Only operate in the scope of their delegated authority – cannot assign or delegate this authority
- Exercise **reasonable care & skill**
- Cannot make secret profits and must not exercise a POA for personal benefit
- Cannot make/change/revoke a **Will** on behalf of a donor
- Must cease to exercise authority if the POA is revoked

What Does a Fiduciary Relationship Entail?

The typical characteristics of a fiduciary relationship in a POA relationship include:

1. The fiduciary has scope for the exercise of **some discretion or power** (agency v. acting during incapacity)
2. The fiduciary can unilaterally exercise such power or discretion so as to affect the legal or practical interests of the grantor
3. The grantor is peculiarly vulnerable to, or at, the mercy of the fiduciary holding the discretionary power

Misuse or Abuse of a POA

How can an Attorney **misuse or abuse** a grantor's property?

- **Stealing** the grantor's money, pension cheques, or possessions
- Committing **fraud, forgery, or extortion**
- **Unauthorized**, questionable, or even speculative **investment decisions**
- Failing to consider **tax implications** of actions/inactions
- Inappropriately dealing with jointly held assets/accounts
- **Misappropriating** the grantor's assets
- **Withholding** bank statements or other financial documents from the grantor

Financial Exploitation

Unduly influencing the grantor to:

- Sell personal property
- Move from or sell the grantor's home
- Invest/withdraw money inappropriately
- Buy alcohol or drugs
- Make or change a Will
- Sign legal documents they do not understand, including documents that transfer assets into joint names
- Give money to relatives, caregivers, or friends; and/or
- Engage in paid work to bring in extra money

Breaching Fiduciary Duties: Case Example

Ventura v. Ventura, [2022 ONSC 6351](#)

- Attorney failed to account for property while acting under POA for Property – moved his family into his mother’s home – costs increased
- Transferred money out of mother’s account into his own and co-mingled funds
- Ordered to pay back nearly \$400k to mom’s Estate

Legal Implications

- An Attorney is in a position of trust – abuse of this position is **very serious**
- An Attorney who abuses their office/appointment can be charged with a criminal offence under the [Criminal Code of Canada](#) through various *Criminal Code* offences including:
 - [Section 331](#) – **Theft by Person Holding Power of Attorney**
 - Theft over \$5,000 is punishable by a maximum of ten years in prison
 - Theft under \$5,000 is punishable by a maximum of two years in prison

Theft by Person Holding POA

R. v. Hooyer, [2016 ONCA 44](#)

- Over \$300,000 stolen – bought himself a Hummer, a friend a Mustang, etc.
- Also defrauded Veterans Affairs
- 2 years less a day in prison
- Plus 6 months for fraud (plus restitution)



Abuse of trust is a criminal offence

R. v. Taylor, [2012 ONCA 809](#)

- Employed caregiver to frail elderly woman becomes POA; uses document to obtain elderly woman's bank card – charged with Fraud
- Drained account of \$126,000, leaving only \$17,000; new caregiver calls the Police
- **The attorney received a 21-month prison sentence**

Common Civil Remedies

1. Stop an attorney from acting under a Continuing POA:

- Extensive powers granted to an attorney
- Document is effective immediately
- Civil court can **order removal** temporarily or permanently

Removal of an Attorney

Adam v. Adam, [2023 ONSC 3093](#)

- Two attorneys were **removed** for failing to:
 - Inform the incapable grantor's son when important care decisions were made on his behalf, in breach of a court Order; and
 - Actively enabling the grantor's alcohol addiction.
 - **Criteria for removal:** *Teffer v. Schaefers Estate*, [2008 CanLII 46929 \(ON SC\)](#)
 1. Must be strong & compelling evidence of misconduct or neglect; and
 2. The best interests of the incapable person are not being served.

Common Civil Remedies

2. Make an attorney explain where the money went:

- Obtain an **order to “account”**
- Judges have broad discretion
- Court can determine attorney breached their duties

Order an Accounting

Bellefeuille v. Bellefeuille, [2018 ONSC 6802](#)

- Attorney used grantor's funds to purchase appliances for her own home & co-mingled funds
- Failed to comply with Order to provide Accounting

Moore v. McLean, [2022 ONSC 295](#)

- Attorney removed for failing to provide accounting in a timely fashion and in an easily/conventionally understood format

Common Civil Remedies

3. Make someone repay the money taken:

- Order payment of “damages” - restitution
- Plus interest on the money taken and legal costs (usually only a portion of the victim’s lawyer fees)

Repayment of Money Improperly Taken

Picone v. Mossetti, [2023 ONSC 1038](#)

- Son acting under POA compensated himself \$8k/year for 31 years despite provision in doc. that no compensation was payable
- While mother in LTC, withdrawals from joint account averaging \$9,800/month from Aug. to Dec. 2018 and \$47k/month in 2019
- Attorney ordered to repay his pre-taking of compensation and money improperly taken

Common Civil Remedies

4. Declare a transfer of property invalid:

- Joint tenancy – “rights of survivorship” unintended risks
- Bank accounts and real property
- Where there is a gratuitous transfer, a rebuttable presumption of resulting trust applies when transfer is challenged – presumption applies to transfers between parents and adult children
- *Petrick (Trustee) v. Petrick*, [2019 BCSC 1319](#) held:
 - Possible for a donor to make a gratuitous transfer in joint tenancy which will be an immediate *inter vivos* gift but will allow the donor to retain the whole beneficial interest during the donor’s lifetime

Transfer Declared Null and Void

Galloway v. Barski, [2016 BCSC 1588](#)

- Adult daughter used POA documents to transfer her parents property into her son's name – neither parent was consulted or agreed
- Father's multiple demands to return property ignored
- Court concluded the transfer of property was *null and void*, and ordered the return of title to the parents

Common Civil Remedies

5. Restitution – Through Unjust Enrichment / Constructive Trust / Resulting Trust

- 1) Benefit conferred to abuser
- 2) Detriment to older adult
- 3) No valid ‘juridical reason’

Resulting Trust for Misappropriated Funds

Marttunen v. McDevitt, [2023 ONSC 208](#)

- Son appointed Attorney for Property – breaches his fiduciary duties by making unauthorized transfers from joint account for his own benefit
- Court orders that \$443,000 held on resulting trust for the benefit of the mother

Common Civil Remedies

Void or set aside a predatory marriage:

- Prey on vulnerable for financial gain through marriage
- Lack of capacity
- Criteria for capacity easily met

Professional Misconduct

- July 2023 – CICO fines Representative for making unsuitable, excessively risky, investment recommendations for vulnerable older clients: \$22,641 in losses
- June 2023 – former bank manager in BC receives 24-month conditional sentence for misappropriating \$157k from client and bank
- January 2024 – former mortgage broker in Manitoba sentenced to 15-month community sentence for stealing over \$500k from widowed older adult

WEL Partners Resources

WEL resource books are available to download in PDF format.



Will & Estate Challenges: <https://welpartners.com/resources/WEL-on-will-and-estate-challenges.pdf>

Elder Law: <https://welpartners.com/resources/WEL-on-elder-law.pdf>

Fiduciary Accounting: <http://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf>

Guardianship: <https://welpartners.com/resources/WEL-on-guardianship.pdf>

Powers of Attorney: <https://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>

Dependants' Support: <https://welpartners.com/resources/WEL-on-dependants-support.pdf>