



Canadian Centre for Elder Law

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ELDER ABUSE: CIVIL AND CRIMINAL REMEDIES

By

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1. INTRODUCTION

When 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 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.

2. ELDER ABUSE: OVERVIEW

Elder abuse can take many forms, including financial, physical, psychological (mental or emotional) and sexual abuse. Neglect can also be an overlooked form of abuse.

According to a 2016 Statistics Canada report, nearly 4% of victims of family violence were 65 years or older. Nearly 61% of incidents of elder abuse were physical assaults against older adults and 21% involved threats. 31% of older adults were victimized by a family member. Among women victims, 33% were victimized by their spouse and 31% by their grown children. In comparison, among men, the victim's grown child was the most common perpetrator.¹

According to the Canadian Department of Justice, financial abuse is the most commonly *reported* type of abuse against older adults.² However, the Department of Justice also commented on the difficulty in estimating the accurate prevalence and incidence of elder abuse in Canada due to obvious factors associated with under-reporting.³ Financial

¹ M. Burczycka & S. Conroy, (2018). "Family violence in Canada: A statistical profile, 2016." Juristat, Canadian Centre for Justice Statistics, Statistics Canada, Catalogue no. 85-002-X, online: <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/problem-canada.html#fn1-0-rf> Accessed on: 03.07.18.

² Department of Justice, *Backgrounder Elder Abuse Legislation*, online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32716.html

³ *Ibid.*

abuse can look like anything including improper use of bank accounts, including 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.⁴ 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.⁵ Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust (where there is a power imbalance).⁶ Financial abuse often occurs in connection with other types of abuse. For example, an attorney under a power of attorney document may refuse to provide an older adult with funds to pay for groceries or provide for other necessities of life.

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.⁷

The United States’ Centers for Disease Control and Prevention (the “CDC”) defines elder abuse as:

An intentional act, or failure to act, by a caregiver or another person in a relationship involving an expectation of trust that causes or creates a risk of harm to an older adult.⁸

The CDC defines an “older adult” as “someone age 60 or older”. The CDC also advocates for a “consistent definition for elder abuse” in order to:

⁴ 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>

⁵ Ontario Provincial Police, *Tip Sheet on Abuse of Older Adults*, online: <http://www.opp.ca/ecms/files/250363255.6.pdf>

⁶ 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>

⁷ http://www.who.int/ageing/projects/elder_abuse/en/

⁸ Centers for Disease Control and Prevention, *Definitions*, online: <https://www.cdc.gov/violenceprevention/elderabuse/definitions.html> [accessed on 30.07.19].

Monitor the incidence of elder abuse and examine trends over time. Consistency helps to determine the magnitude of elder abuse and enables comparisons of the problem across locations. This ultimately informs preventions and intervention efforts.

Unfortunately, elder abuse has been 1) poorly or imprecisely defined, 2) defined specifically to reflect the unique statutes or conditions present in specific locations (e.g. states, counties or cities), or 3) defined specifically for research purposes. As a result, a set of universally accepted definitions does not exist.⁹

Elder abuse can involve:

- misusing a power of attorney document, a legal document where a person gives another the legal authority to make financial decisions on the donor's/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

⁹ Centers for Disease Control and Prevention, Definitions, online:
<https://www.cdc.gov/violenceprevention/elderabuse/definitions.html> [accessed on 30.07.19].

- Gift money to relatives, caregivers or friends
- Engage in paid work to bring in extra money;¹⁰
- An adult child who threatens an older adult that they cannot see their grandchildren unless they guarantee a loan or gives them money (psychological abuse);
- Failure to provide necessities of life under a power of attorney document (shelter, food, medication, assistive devices);
- Isolating the older adult to gain control;
- Domestic violence, physical or sexual abuse, and
- Predatory marriage.¹¹

Indicators of 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;

¹⁰ N.I.C.E. – Tools for Preventing and Intervening in Situations of Financial Abuse, <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario>

¹¹ Where a person marries an older person in order to gain access to their money and assets.

- 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 documents;
- being overcharged for services or products by providers; or
- being denied the right to make independent financial decisions.¹²

The most frequent perpetrators of 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).

Frequently, adult children who harm their parents have various health concerns themselves, including issues related to mental health, substance abuse, social isolation, and employment and financial dependency on the older person.¹³ The abuser may rationalize the abuse thinking that they deserve the money as they are the older adult's child.

Older adult 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;

¹² N.I.C.E. – Tools for Preventing and Intervening in Situations of Financial Abuse, <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario>

¹³ Laura Tamblin Watts, "Background Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts" Canadian Centre for Elder Law, March 2013

- 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;
- may be suffering from dementia or lack of requisite mental capacity;
- worried about stigma on the family; or
- resistant to having strangers in the home to provide services that the abuser does.

3. CIVIL & CRIMINAL REMEDIES

Once an abuse is reported or discovered, there are at least two avenues that can be followed in remedying elder 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).

While criminal prosecution is a possibility in the context of abuse, it is not always an ideal response for a variety of reasons: prosecutions are often difficult since the victim may be reluctant to cooperate in a prosecution of a loved one; the older adult victim may be in poor health; the prosecution takes so long that the victim dies before the case goes to trial; or, the abuser may be the only significant person in the victim's life, and as such, to report them or testify against them would result in loneliness and pain from the perceived consequences.

For a number of reasons, financial abuse of older adults does not always attract criminal charges. A victim may be unable or unwilling to extricate themselves 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 thought to be civil in nature. We seek to demonstrate there are several sections of the *Criminal Code* that may well be under-utilized due to this apparent misperception that such matters are best suited to civil recourse rather than criminal.

While anyone can commence a civil action (as opposed to relying on the Crown to pursue charges), there are still many barriers to overcome in order to achieve justice for victims in civil courts. Often, civil remedies are only available to those who can afford this costly process. Hiring a lawyer is not inexpensive. Civil litigation can also potentially take many years, which poses a practical problem for an older adult plaintiff who may not have the luxury of time. 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.

There are a number of federal and provincial/territorial laws that may also apply to abuse of seniors. Federally, besides the *Criminal Code*, privacy legislation is also relevant. Older adult abuse has been addressed provincially through adult protection and guardianship legislation, legislated protection for adults living in residential care, domestic violence legislation, and human rights legislation.¹⁴

4. 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 occurred. In other words – to have the perpetrator pay back the money with punitive result (the payment together with a 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 that may not include a return of the money. In

¹⁴ See Appendix “A” to this paper for a list of provincial/territorial legislation.

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 the perpetrator wrongfully assumed control of it.

In a civil court proceeding, 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 would be more appropriate: 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 suitable.

Lawyers practicing civil litigation often see two types of financial elder abuse that can be remedied in the civil courts:

1. **Breach of fiduciary duty** by a substitute decision maker. For example, in British Columbia someone who is acting as an attorney under a Power of Attorney (“POA”), or under an Enduring Power of Attorney (“EPOA”) and making financial or property decisions on behalf of the donor, is a fiduciary¹⁵ and must fulfill certain ethical, moral and legal duties/obligations. The duties of an attorney are codified in the *Power of Attorney Act*, RSBC 1996, c. 370.¹⁶ Also, a representative under a Representation Agreement, made pursuant to the *Representation Agreement Act*, RSBC 1996, c 405, who makes health care and personal care decisions, or “provides routine management of the adult’s financial affairs” must also fulfill certain ethical, moral and legal duties/obligations.¹⁷ A fiduciary’s actions are also governed by common law.¹⁸ In Ontario, someone who is acting as an attorney,

¹⁵ See *Lau v Lee* (1994) 49 ACWS (3d) 647(BCSC), aff’d [1996] BCJ No 1667 (CA); *McMullen v Webber* et al, 2006 BCSC 1656 at para 51.

¹⁶ *Power of Attorney Act*, RSBC 1996, c 370, section 19.

¹⁷ See Part 3 of the *Representation Agreement Act*, RSBC 1996, c 405, “Duties, Powers and Liability of Representatives and Monitors”, sections 16-26 and the Representation Agreement Regulation, BC Reg 199/2001.

¹⁸ See for example, *Andreasen v Daniels-Ferrie*, 2001 BCSC 1503 at para 27.

under a Power of Attorney for Property (“POAP”), or under a Continuing Power of Attorney for Property (“CPOAP”) must also fulfill certain ethical, moral and legal duties/obligations. That attorney’s actions are fiduciary in nature and are governed legislatively by the *Substitute Decisions Act, 1992*, SO 1992 c 30.

2. An “**inadvertent**” transfer of assets, meaning, the transfer of money, or real property (houses, land, condos, cottages), or property rights or beneficial rights, by a vulnerable adult to another person. One way this happens is through an outright transfer to another, the transfer 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. Or an abuser obtains rights to a vulnerable adult’s property through a “predatory marriage”. The abuser preys on someone who lacks capacity or unduly influences them into marriage so they can appropriate all the property rights of the spouse.

The Power of Attorney Document

There are several types of power of attorney documents in British Columbia:

A “**General**” POA becomes effective once signed by the person giving the power of attorney (the donor) but ends on incapacity, revocation or death of the donor.

A “**Limited**” POA is similar to the “General” POA but it is used for a specific purpose and/or limited periods of time.

An “**Enduring**” POA is the most common form, where it is active once signed and continues to be effective if the donor becomes incapable but ends on revocation or death.

And finally, there is the “**Springing**” POA which does not become effective until the donor is incapable (or another specified trigger) but ends if the donor regains capacity or death.

In Ontario the terminology differs slightly. For example, the person appointing the attorney under a power of attorney document is called a grantor rather than a donor. And, while

Ontario also has general and limited power of attorney documents, it is a *Continuing Power of Attorney for Property* that Ontarians use to make sure that their financial affairs are looked after at a time when they (the grantor) can no longer look after their 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 is conditionally only to 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 an EPOA in British Columbia or a CPOAP in Ontario has the power to do anything on behalf of the donor/grantor that that person could do if capable, except make a will. These powers are subject to legislative governance and various court-imposed conditions.

In British Columbia these powers are set out in Section 20-21 of the *Power of Attorney Act*, RSBC 1996 c 370. Section 19 of the *Power of Attorney Act*, RSBC 1996 c 370 particularizes the obligations and duties of an attorney under an EPOA.

Section 7(2) of the *Substitute Decisions Act*, 1992 SO 1992, c 30 sets out the powers of an attorney under a CPOAP, with section 32 providing, the various obligations and duties of an attorney acting under the authority of a CPOAP.

When there is an abuse of the powers granted under a POA document, there are several legal remedies available in the civil litigation system.

a) *Removal of Attorney*

In British Columbia, if an attorney under a POA document abuses his or her power and the donor is incapacitated, one remedy is to ask the civil court to declare the donor to be incapacitated and appoint a committee of estate, under the *Patients Property Act* RSBC 1996, c 349 to make financial and legal decisions for the adult, or a monitor to oversee the attorney’s actions on behalf of the donor. The appointment of a committee, whether it is a family member or the Public Guardian and Trustee, cancels the POA.

Under section 34 of the *Power of Attorney Act*, a concerned person may make a report to the PGT regarding any abuse or undue influence of an attorney. The PGT must then review the report and decide upon next steps, which could include conducting an investigation or applying for a court order to terminate all or part of an EPOA, etc.¹⁹

Further, any person who makes a report to the PGT, may also apply to the court for various remedies, including an order terminating the EPOA or a declaration that the EPOA and all actions done under it are void.²⁰

In Ontario the *Substitute Decisions Act* prescribes the court procedure for holding an attorney accountable for its actions. A court can order that the grantee be removed as an attorney and can prohibit them from acting as an attorney under a POA.²¹

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

One civil remedy to address any money wrongfully taken by an attorney under a POA is to ask the civil court to order an accounting of how the donor’s money was spent. The attorney would need to provide a tracking of all transactions undertaken for the donor/grantor, i.e., to provide financial documents and back-up to show how he or she was spending the money. That process is called an “accounting”.

In British Columbia the requirement to account is codified in section 19 (1)(d) of the *Power of Attorney Act* and in greater detail in the *Power of Attorney Regulations*, BC Reg 20/2011, sections 2(1) and (2). The duty to account can also be found in case law.²² In British Columbia only the donor of the authority, or their estate, may apply to have the attorney provide a full accounting of the attorney’s activities.²³

In Ontario, 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

¹⁹ See *British Columbia (Public Guardian and Trustee) v Ferrier*, 2017 BCSC 2142.

²⁰ *Power of Attorney Act*, RSBC 1996 c 370 section 36(5).

²¹ See the factors for removal of an attorney set out in *Schaefer's Estate* (2008) 93 OR (3d) 447 (SCJ)

²² See *McEwen v Jenkins Estate*, 1958 CanLII 69 (SCC), *Brown v Brown*, 2011 BCSC 649 and *Sull v Pengelly*, 2019 BCSC 575.

²³ See *Sull v Pengelly*, 2019 BCSC 575 at para 116.

attorney.²⁴ Judges have a broad discretion in an accounting application – they can make all manner of 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.

c) *Repay Money Improperly Taken*

If the civil court finds that an attorney under a POA document improperly took money from the donor or did not pursue another who, for example, did not repay a “loan” from 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.

d) *“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 may open a joint account with one of their adult children. Then 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”. The 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

²⁴ See section 42 of the *Substitute Decisions Act*, 1992, SO 1992 c 30.

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.

e) Restitution (Unjust Enrichment/Constructive Trust/Resulting Trust)

A court can declare that although the abuser may have “legal” title to property, the “beneficial” title belongs to the older adult. In other words, while the name on the property is that of the abuser – the property really belongs to the older adult. This may occur where an abuser has been “unjustly enriched”. An abuser has been unjustly enriched where a benefit has been given to the abuser (the older adult made payments on the abuser’s mortgage, or made the abuser a joint tenant on title), to the detriment of the older adult and there is no lawful reason for it to have happened.²⁵

If the Court finds that the abuser has been unjustly enriched then the Court can order that money be paid to the older adult or order that property the abuser holds is being held “in trust” for the older adult.

f) Setting Aside or Declaring a Predatory Marriage as “Void”

Another form of financial abuse is where an older adult inadvertently transfers property or beneficial rights through a predatory marriage.

A predatory marriage is one where unscrupulous opportunists prey upon, in particular, older adults with diminished reasoning ability purely for financial gain through the contract of marriage as marriage brings with it a wide range of property and financial entitlements. For example, while no longer the case in British Columbia, in Ontario marriage still revokes a Will. Therefore, if the victim of such a marriage had a Will in place, it would be revoked and the perpetrator, as a spouse, would stand to inherit under intestacy legislation.

²⁵ See *Garland v Consumers’ Gas Co*, 2004 SCC 25 at para 50 and *Kerr v Baranow* 2011 SCC 10.

The overriding problem with predatory marriages is that they are not easily challenged at common law. Recent cases indicate success in righting this type of wrong depends on the existence of sufficient, compelling medical evidence of incapacity.

The traditional way is to argue that the older adult did not have the requisite capacity to enter into the marriage. However, the older adult will likely be considered capable of marriage if they can appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one's children. Also, they might be required to have the requisite capacity to manage property and make person care decisions.

The historical case law developing the understanding that marriage is a simple task not requiring a high degree of intelligence is criterion that is increasingly easily met and therefore courts often find that the older adult was capable even in the most obvious cases of exploitation.²⁶

5. BC & ON COURT DECISIONS HIGHLIGHTING CIVIL REMEDIES

BRITISH COLUMBIA CASES

Sangha (Re): Repayment of Money Improperly Taken

In this case,²⁷ an older father of three adult children, diagnosed with a degenerative disease involving the gradual deterioration of the brain that leads to both serious physical and cognitive decline, attempted to plan for his incapacity. He did this by naming his three children as representatives under a Representation Agreement (although only his daughter was aware that she was a representative), and his daughter and two close friends/advisors as his attorneys under an enduring power of attorney ("EPOA").

However, the father was not happy with the actions of his daughter. She was very controlling, restricted his visitors (including visits by his lawyer and doctor), dictated his

²⁶ For more information on predatory marriages see: Kimberly A. Whaley and Albert H Oosterhoff, "Predatory Marriages", Law Society of Ontario, Six-Minute Lawyer, 2018 (online: <http://welpartners.com/resources/WEL-six-minute-estates-lawyer-predatory-marriages-2018.pdf>); Kimberly Whaley et al, *Capacity to Marry and the Estate Plan*, (Aurora: Canada Law Book, 2010); Albert H. Oosterhoff, "Predatory Marriages" (2013) 33 ETPJ 24, Kimberly Whaley and Albert H Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 ETPJ 269.

²⁷ *Sangha (Re)*, 2013 BCSC 1965

diet against his wishes, etc. When the father wanted to make a phone call she instructed the staff at his care home to call her instead (rather than the person her father sought to contact) and then if she did not answer, the staff were to leave a message as if they were leaving a message for the requested contact.²⁸

He revoked the Representation Agreement and executed a nomination of committee to appoint all three of his children, and a direction authorizing all three of his children (or two acting together) to apply to the court to be appointed as his committees. He made no changes to the EPOA.

The following day, the daughter filed a petition to have her father declared incapable and to be named as his *sole* committee. The siblings and friends opposed the petition. The daughter incurred over \$100,000.00 in legal fees for her committee petition and charged those fees to her father's credit cards.

On all the evidence the court was satisfied that the daughter was not suitable as a sole committee of either the person or the estate of her father. The other two siblings were appointed committee of the person and a long-time trusted friend and advisor, his committee of estate. Of "particular concern" to the court was the daughter's "inability to consult with her fellow co-attorneys" and the fact that she was incurring charges on her father's credit card without consulting them.²⁹

In acting unilaterally to pay her legal fees with her father's credit card, contrary to the terms of the EPOA, the daughter was in breach of her fiduciary obligation to her father. This breach was "further compounded by the fact that she knew that her father opposed both unilateral action and the commencement of any contested legal proceedings." Her actions went against her father's wishes and as such were in contravention of her duties under the *Power of Attorney Act*.

²⁸ *Sangha (Re)*, 2013 BCSC 1965 at para 61.

²⁹ *Sangha (Re)*, 2013 BCSC 1965 at para 58.

The court ordered the daughter to “forthwith return to her father the funds she improperly used, being the sum of \$105,474.05, with interest at the rate (if any) such funds were earning in the [father’s] account.”³⁰

Galloway v Barksj: Return of Property Improperly Transferred

In *Galloway*,³¹ a daughter used power of attorney documents to transfer property owned by her parents to her son, arguing that she did this to protect her parents from her brother, who lived with them and whom she believed had abused and manipulated them. A “Declaration of Bare Trust and Agency Agreement” was executed with the grandson as “Nominee” and the daughter as “Attorney” and owner of the property. Neither the father nor the mother was consulted or agreed to the transfer of the property. The father’s multiple demands for the return of the property were ignored.

In the proceeding, the father argued (the mother had passed away before the hearing) that he was legally competent, and he wanted title to the property to be put back into his name. He relied on section 27 of the *Property Law Act*, RSBC 1996 c 377 which prohibits an attorney from transferring property to herself unless expressly authorized in the power of attorney. Further, the father noted that the transfer took place after the daughter learned that he had changed his Will so that it benefited his son more than his daughter.

The daughter and grandson argued that on the basis of the trust agreement that they could not be compelled to transfer title to the property back to the father notwithstanding his expressed direction to do so.

The court concluded that the transfer of the property and the trust were null and void and title to that land must be returned to the father. Notwithstanding the daughter’s claims concerning her brother’s behaviour, the court found that the daughter “breached her duties as an attorney in using the power of attorney to transfer title to her son. . .in trust for herself without consulting [her father] and obtaining his consent.” In circumstances

³⁰ *Sangha (Re)*, 2013 BCSC 1965 at para 107.

³¹ *Galloway v Barski*, 2016 BCSC 1588

where an attorney has used a power of attorney to confer a benefit on themselves or a family member, s 27 of the *Property Law Act* will operate to void that transfer.³²

The court noted that if the daughter continued to have concerns about her brother's relationship with her father, the *Adult Guardianship Act*, RSBC 1996 c-6 provides options for reporting instances of abuse.³³

British Columbia (PGT) v Ferrier: Removal of Attorneys

In this case³⁴ two adult children in their 50s (who were attorneys under POA document) thought it was okay to attempt to use their elderly mother's money to pay off \$451,000 on their mortgage, \$20,000 on a line of credit, and to make purchases at boat and kayak stores.³⁵ \$10,000 was also transferred out of the mother's bank account, with \$6,000 going directly to the son personally and the remainder to third parties for unspecified reasons.

An investigation was commenced by the PGT under section 7 of the *Power of Attorney Act*. In response to the legitimate concerns the son called the PGT staff members "douchebags", "losers", "assholes" and "shitheads". He also threatened to "begin criminal charges" against the PGT for various crimes including torture and fraud, and during his oral argument "for some reason, he added the charge of culpable homicide".³⁶

The mother lived with the adult children, and the court observed that she was happy, comfortable, and well looked after, and that the issue of the case was not her "physical well-being or safety but rather the respondents' approach to managing her money and property."³⁷

The court found that it was clear from the respondents' evidence that "they consider their mother's estate not as her personal property that they are under a legal duty to protect,

³² See *Egli v Egli*, 2004 BCSC 529 at para 82, aff'd 2005 BCCS 627.

³³ See also the costs decision *Galloway v Barski* 2017 BCSC 319 and the assessment of special costs decision, *Galloway v Barski*, 2019 BCSC 335.

³⁴ *British Columbia (Public Guardian and Trustee) v Ferrier*, 2017 BCSC 2142.

³⁵ *British Columbia (Public Guardian and Trustee) v Ferrier*, 2017 BCSC 2142 at para 6.

³⁶ *British Columbia (Public Guardian and Trustee) v Ferrier*, 2017 BCSC 2142 at para 8.

³⁷ *British Columbia (Public Guardian and Trustee) v Ferrier*, 2017 BCSC 2142 at para 9.

preserve and use for her care, maintenance and benefit, but common property which they may access at their discretion for their own purposes as well as her.”³⁸

On the medical evidence presented, the court declared the mother incapable of managing her affairs and her person, and that the power of attorney in favour of the respondents was terminated. The PGT was appointed as committee of the person and estate of the mother.

***Sull v Pengelly*: Resulting Trust (Not a Valid Gift)**

The British Columbia Supreme Court found in this case³⁹ that an elderly mother’s “gift” of a one-half joint interest in her house was not valid, and that the presumption of resulting trust applied. In other words, while legal title to the house belonged to the daughter after the “gift”, she was really holding it in trust for her mother (and eventually her mother’s estate after the mother died).

In order to determine if the gratuitous transfer by the elderly mother to the daughter was a valid gift, the court relied on *Pecore v Pecore* 2007 SCC 7, and looked at evidence of the mother’s intention. Various witnesses provided evidence that the mother intended to leave equal shares of the property to all three of her children and her Will contemplated that her estate would be divided equally between her three children. Further there was no evidence that the daughter incurred any expenses of any sort related to the property prior to her mother’s death, indicating that the mother still treated the property as her own. The court was satisfied on the evidence that the mother “did not intend to gift either the right of survivorship or any other interest in the property” to her daughter.

Further, using an EPOA the daughter misappropriated over \$325,000.00 belonging to her mother. In August 2008 the elderly mother was generally debt-free. By January 2012 there was a balance of \$300,910.00 on a mortgage on the property and an outstanding balance of \$19,000 on a credit card. On the evidence provided, the court was satisfied that the daughter was responsible for the misappropriation, however, the court concluded

³⁸ *British Columbia (Public Guardian and Trustee) v Ferrier*, 2017 BCSC 2142 at para 11.

³⁹ *Sull v Pengelly*, 2019 BCSC 575.

that, based on the length of time that had passed, it would not serve any useful purpose to send the matter to the Registrar for an accounting.

As the daughter had already sold the property shortly after her mother's death, the daughter was ordered to pay her siblings their share of the proceeds as set out in the Will and their share of the misappropriated funds.

ONTARIO CASES

Carey v Carey: Removal of Attorneys

This case⁴⁰ opens with the words of Abraham Lincoln: "*A house divided against itself cannot stand*".

The mother suffered from dementia and two capacity assessors agreed that she was incapable of managing both her property and her personal care. The mother's legal counsel also concluded that she was incapable of instructing her lawyer.

There were seven siblings in total fighting over the care of their mother and what was in her "best interests" including, where she should live. There were also allegations of elder and financial abuse. The mother was being shuttled between the two homes of her attorneys under a POA, that of her son Arthur (on Saturday to Tuesday) and then with her other son Douglas (from Wednesday to Saturday).

There were disputes on when the mother could have contact with her other five children. The other siblings called the police to pay a number of "wellness" visits on their mother alleging "elder abuse". The Police visited on multiple times and confirmed her well-being. At no time did the officers report any concerns. Neither did the doctor or dentist who also saw the mother.

One of the main questions for the court was whether the two sons should be removed as attorneys. The court concluded that there was strong and compelling evidence of

⁴⁰ *Carey v Carey* 2018 ONSC 4564. Appeal to Court of Appeal for Ontario quashed on the basis that the order appealed from was interlocutory: *Carey v Carey* 2019 ONCA 144.

misconduct and /or neglect by Arthur (who worked in concert with Douglas). Just some of the misconduct included:

- Arthur failed to adequately explain how he spent all of his mother's \$42,000 per year pension income when she had no independent housing costs, no car, etc.
- Arthur failed to adequately account for how increased mortgage funds were utilized.
- Arthur and Douglas failed to obey a number of court orders requiring disclosure.
- There was credible evidence regarding the mother's missing jewelry and that Arthur pawned it.
- At the very least, the attorneys had "shown little skill in using her funds in a responsible manner to secure her financial best interests".
- Whatever Arthur may have done or neglected to have done, Douglas failed to step in.
- Arthur and Douglas failed in their duties to foster regular contact between the mother and her other siblings; etc.

Justice Kurz found that the two-part test set out in the case of *Schaefer's Estate*,⁴¹ (that there must be strong and compelling evidence of misconduct or neglect and the court must consider whether the best interests of an incapable person are being served) had been met and removed Arthur as the attorney and Douglas as the alternate attorney.

McMaster v McMaster: Accounting Ordered (and Removal of Attorney)

In one rather sad case⁴² 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).

⁴¹ (2008) 93 OR (3d) 447 (SCJ)

⁴² *McMaster v McMaster* 2013 ONSC 1115, costs decision 2014 ONSC 2545.

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, including 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.

***Servello v Servello*: Return of Property Improperly Taken**

In this case,⁴³ shortly after his father's death a son took his 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 courthouse 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 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 he 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:

⁴³ *Servello v Servello* 2015 ONCA 434

“...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 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.

Zimmerman v McMichael Estate: Repayment of Money Improperly Taken

A deceased husband and his surviving wife were founders of an extensive Canadian art collection (the McMichael Collection) donated to the province of Ontario.⁴⁴ 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.

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 POA was void and an order that required Mr. Zimmerman to explain or account for his financial dealings with Mrs. McMichael's property.

⁴⁴ *Zimmerman v McMichael Estate*, 2010 ONSC 2947.

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 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.

6. PROVINCIAL/TERRITORIAL LEGISLATION

Besides remedies found under the *Criminal Code*,⁴⁵ each province and territory has created various laws in response to adult abuse and neglect. Generally, the following different types of provincial legislation may apply to abuse of older adults:

- Adult protection laws
- Protection for persons in care legislation
- Neglect legislation
- Domestic violence legislation
- The Quebec Charter of Human Rights and Freedoms
- Public Guardian and Trustee Legislation

⁴⁵ RSC 1985, c.C-46

A small number of jurisdictions have adult protection laws that apply to adults who meet a definition of an “adult in need of protection”. These include British Columbia,⁴⁶ Yukon,⁴⁷ Prince Edward Island,⁴⁸ and New Brunswick.⁴⁹ In British Columbia, Yukon and PEI there are agencies designated by regulation to investigate and respond, although there is no duty to report.

Nova Scotia is the only jurisdiction in Canada that has a mandatory reporting regime for abuse of adults and this duty applies under limited circumstances under the *Adult Protection Act*.⁵⁰ In Newfoundland and Labrador, there is a general duty on everyone to report neglect. However, the duty under both of these acts does not apply to financial abuse per se, as they focus on physical, sexual, or mental abuse, or “neglect” in general.

In British Columbia,⁵¹ Alberta,⁵² Manitoba,⁵³ Ontario⁵⁴ and Nova Scotia⁵⁵ employees or operators of care facilities have a statutory duty to report and investigate abuse.

In some provinces and territories the public guardian and trustee (the PGT) has some power to intervene in circumstances of financial abuse or abuse by, an attorney under a power of attorney, guardian, trustee or other substitute decision maker, but there is no duty to report to a PGT. In Yukon,⁵⁶ British Columbia,⁵⁷ Alberta,⁵⁸ Saskatchewan,⁵⁹ Ontario⁶⁰ and Quebec⁶¹ the PGT has the power to investigate abuse.

Like the *Criminal Code*, provincial and territorial legislation are essentially age neutral, there are no laws that apply exclusively to older people, laws were made to protect people

⁴⁶ *Adult Guardianship Act*, RSBC 1996, c. 6

⁴⁷ *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A.

⁴⁸ *Adult Protection Act*, RSPEI 1988, c A-5

⁴⁹ *Family Services Act*, SNB 1908, c F-2.2

⁵⁰ *Adult Protection Act*, RSNS 1989, c.2

⁵¹ *Community Care and Assisted Living Residential Care Regulation*, BC Reg 96/2009 Sched. D

⁵² *Protection for Persons in Care Act*, SA, 2009 C.P-29.1

⁵³ *The Protection for Persons in Care Act*, CCSM, c P144

⁵⁴ *Long-Term Care Homes Act*, SO 2007, c8

⁵⁵ *Protection for Persons in Care Act*, SNS 2004 c 33

⁵⁶ *Public Guardian and Trustee Act*, SY 2003, c 21 Sch C, Part2 s.9(1)

⁵⁷ *Public Guardian and Trustee Act*, RSBC 1996, c 383 s.17

⁵⁸ *The Adult Guardianship and Trusteeship Act*, SA 2008, cA-4.2 ss75-77

⁵⁹ *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 s40.7

⁶⁰ *Substitute Decisions Act*, SO 1992, c 30, s27.

⁶¹ *Pubic Curator Act*, RSQ, c C-81

at risk. For a full list of related provincial or territorial legislation see **Appendix “A”** attached to this paper.

7. CRIMINAL REMEDIES

The Canadian *Criminal Code*⁶² 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 certain offences under which such a perpetrator could be charged, including:

- **Section 215: Failing to provide the necessaries of life (criminal neglect);**
- **Section 220: Causing death by criminal negligence (where neglect leads to death of older adult);**
- **Section 264.1: Uttering threats;**
- **Section 265: Physical assault;**
- **Section 271: Sexual assault;**
- **Section 279: Unlawful confinement;**
- **Section 322: Theft;**
- **Section 331: Theft by a person holding a power of attorney;**
- **Section 336: Criminal breach of trust (Conversion by Trustee;)**
- **Section 342: Theft or forgery of a credit card;**
- **Section 346: Extortion;**

⁶² RSC 1985, c C-46.

- **Section 366: Forgery;**
- **Section 386-388: Fraud; and**
- **Section 423: Intimidation**

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

In 2015 the *Canadian Victims Bill of Rights*⁶³ came into force. This Bill of Rights provides clear rights for victims of crime including the right to information, participation, protection, and restitution. Some examples of victim's rights include receiving information about the review of an offender's conditional release, timing and conditions of that release, a current photo of the offender prior to release, and other.

8. COURT DECISIONS HIGHLIGHTING CRIMINAL REMEDIES: 2011-2019

***R v Kaziuk* (2011, Oakville, ON)**

Section 334 (Theft), 380 (Fraud), 331 (Theft by Person Holding a Power of Attorney)

This case⁶⁴ is interesting because although section 331 (theft by a person holding a power of attorney) was enacted as long ago as 1984, this is one of only a few reported decisions in Canada citing this section 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 reasonable doubt*" and that even though the accused

⁶³ SC 2015 c 13 s 2.

⁶⁴ 2011 ONCJ 851.

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.*"⁶⁵ The Court accordingly reduced the **10-year sentence to 8 years**, but in doing so, observed, "*[w]e agree with the trial judge's observations about the offender.*" Kaziuk sought leave to appeal to the Supreme Court of Canada but it was not granted.⁶⁶

⁶⁵ *R v Kaziuk* 2013 ONCA 217.

⁶⁶ *R v Kaziuk* 2013 CanLII 64666 (SCC).

***R v Taylor* (2012 - 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.⁶⁷ 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:

...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

⁶⁷ *R v Taylor*, 2012 ONCA 809

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 (2013 – Vancouver, BC)

Section 380(1) (Fraud)

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. 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.⁶⁸ The advanced age and vulnerability of his victims was considered as an aggravating factor in the court's sentencing.⁶⁹ 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 \$300.00.⁷⁰

R v Bernard (2015 - Surrey, BC)

Section 380 (1) (a) (Fraud over \$5000)

Joseph Bernard⁷¹ 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

⁶⁸ *R v Cousineau*, 2013 BCSC 947.

⁶⁹ *R v Cousineau*, 2013 BCSC 947 at 11 and 25.

⁷⁰ See *R v Cousineau*, 2013 BCCA 289 where Mr. Cousineau sought to appeal the monetary components of his sentence. However, he was late in filing his application for leave to appeal and brought a written motion to extend the time to file. While the court considered refusing leave to appeal on this motion, the court decided not to as the Crown neglected to request such an order. An extension was provided to Mr. Cousineau; however, no further court decision has been reported.

⁷¹ 2015 BCPC 107.

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 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".⁷² The fraudster was sentenced to **4 years** in custody.⁷³

⁷² 2015 BCPC 107 at para 65.

⁷³ 2015 BCPC 107 at para 66.

***R v Davy* (2015 - Orillia, ON)**

Section 215 (Failure to Provide Necessaries of Life)

There have been an increasing number of convictions under this criminal neglect provision of the *Criminal Code*: failure to provide the necessaries of life. These cases show how neglect and financial abuse can go hand in hand. Family dynamics often play a role, and as noted above, the abuser or abusers often have their own mental health or substance abuse problems. Section 215 is a complex provision as there is a legal duty to provide the necessaries of life to someone under a person's "charge" if that person is: (a) unable to withdraw themselves from the other person's charge for reasons of "detention, age, illness, mental disorder or other cause", and b) "unable to provide themselves with necessaries of life". The courts have interpreted this description to impose, under certain circumstances, a duty on an adult child to provide adequate care for an aged parent, or on a paid caregiver to provide adequate care to a client.⁷⁴

This case, *R. v. Davy*,⁷⁵ 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 necessaries of life to her elderly and vulnerable mother. 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.

⁷⁴ Laura Tambllyn Watts, "Background Paper – Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts" Canadian Centre for Elder Law, March 2013, at p.6

⁷⁵ *R v Davy*, 2015 CanLII 10885 (ON SC).

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 (2016 - Simcoe, ON)

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 couple's 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 disagreed. 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.⁷⁶

***R v Reynolds* (2016 - Victoria, BC)**

Section 322 (Theft)

A daughter stole over \$300,000 from her elderly mother's bank account from 2009-2013.⁷⁷ 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

⁷⁶ 2016 ONCA 44.

⁷⁷ *R v Reynolds* 2016 BCPC 69.

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 (2016 - 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.⁷⁸ The first two charges alleged 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 alleged 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 section 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

⁷⁸ *R v Bruyns* 2016 ONCJ 207.

as those that the long-term care facility provided. There was no 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.⁷⁹

***R v Curreri* (2016 - Toronto, ON)**

S.380 (1) (a) – Fraud over \$5,000

A son was charged under section 380 (1) (a) for committing fraud over \$5,000.00 against his 96-year-old father.⁸⁰ 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. Both the son and legal assistant were sentenced to **two years less a day to be served in the community (house arrest)**. The son was also ordered to pay restitution.⁸¹ The Law Society of Ontario also disciplined a lawyer for being duped

⁷⁹ 2016 ONCJ 527.

⁸⁰ *R v Curreri*, 2016 ONSC 3598.

⁸¹ 2017 ONSC 5652.

by the son and the assistant. The lawyer admitted to professional misconduct and was fined \$25,000.00.

R v Siwicki (2018 – Winnipeg, MB)

Section 220 (Causing death by criminal negligence) Section 215 (failure to provide the necessities of life)

Ronald Siwicki lived with his 89-year-old mother and was her sole caregiver. He entered a guilty plea to criminal negligence causing her death.⁸² This decision dealt with his sentencing.

After Siwicki called 911, the first responders found the mother’s body on the floor in the hallway. She was on a plastic sheet with a blanket over her, covered in feces and urine, her hair was matted and dirty and she had several gaping and infected bedsores on her leg and hip. The house was in an “appalling state: cluttered, dirty and smelling of urine and feces”.

The son told police that his mother had fallen out of bed several weeks earlier and he was unable to lift her to get her back into bed. He said he didn’t call an ambulance because his mother didn’t want to go to the hospital, but he gave her water and a food supplement every day. After she died, he alleged he pulled the blanket off her and was shocked at what he saw, moved her from the bedroom to the hall and tried to wash her so she would not be seen that way. He waited several weeks before calling 911 to report her death.

An autopsy revealed she died from sepsis, a complication from the bedsores which would have caused her significant pain and which could have been successfully treated. Her brain also showed signs of dementia.

The son testified that he had tried to get help for his mother as she got older and her illnesses made her more immobile. He suggested taking her to the hospital or elder care centres, sought home care help, etc. but the mother always refused and wanted to remain

⁸² 2018 MBQB 115.

at home. He testified that he tried to care for her himself. He also accepted full responsibility for causing his mother's death and was traumatized by her passing.

By pleading guilty the court noted that Siwicki acknowledged his failure to provide assistance to his mother. The Crown sought three years imprisonment. The defence argued that Siwicki's actions were "borne of ignorance and a lifetime of wanting to please" and asked for a suspended sentence and probation. After reviewing the aggravating factors (i.e. he was in a position of trust with his mother) and the many mitigating factors, the Court sentenced Siwicki to three months' imprisonment (and credited time in custody of one month).

***R v Fernandez* (2018 – Brampton, ON)**

Section 267 (b) (Assault causing bodily harm)

Fernandez was a personal support worker at a long-term care facility who punched a 97-year-old woman causing severe bruising. He was found guilty of assault causing bodily harm.⁸³ Fernandez initially denied, yet later admitted, committing the offence. In his presentence report he stated that: "*My initial dishonesty turned to a ball of lies that snowballed out of control, and I was too scared and embarrassed to turn things back.*" He apologized to the victim and her family.

The court noted that "*this is a case of what is sometimes referred to as 'elder abuse', that is, abuse of an elderly person by his or her caregiver. I agree with Crown counsel that the principles of deterrence and denunciation are of particular importance in such cases.*" Fernandez was sentenced to a term of imprisonment for **six months**, to be served in the community (with conditions, remain in his house, not be in contact with anyone over 65 etc.) and probation.

⁸³ *R v Fernandez*, 2018 ONSC 272.

***R v Saucier* (2019 – Cornwall, ON)**

Section 380 (1) (Fraud over \$5,000), Sections 368 (1) & 366 (1) (Forgery, Uttering a Forged Document)

This case⁸⁴ involved a financial advisor who stole (defrauded and misused funds) from his elderly retired clients over a period of three years. In doing so he forged and used forged documents. The clients paid him money expecting that it would be used for their life insurance premiums. Instead he deposited the money into two bank accounts he controlled. Ultimately however, when the clients asked for their money back, all of the money was repaid to the clients.

He was found guilty of 10 counts of fraud over \$5,000, 4 counts of uttering forged documents and 1 count of forgery.

In the sentencing decision, the Court noted that all of the funds had been returned to the victims. However, the victims had been impacted in other ways with trust issues and emotional impact. The Court also noted that:

many of the victims were vulnerable by reason of their age, relative lack of sophistication in financial matters, or because of their personal circumstances at the time the offences were committed. Many of the victims were of relatively modest means. ...some also needed the accused to translate documents and make out their cheques because of language and literacy issues...⁸⁵

He was sentenced to **15 months** in jail.

***R v Barker* (2019 – Pictou, NS)**

Section 380 (1) (a) (Fraud (over \$5,000))

This case⁸⁶ starts with the words “*This is a case of elder abuse.*”

A married couple forced the wife’s 83-year-old mother who had dementia, dysphasia, and needed around-the-clock care to sign a number of lending and financing documents. The mother lacked the required capacity to enter into the financial services contracts, but she

⁸⁴ *R v Saucier* 2019 ONSC 3611.

⁸⁵ 2019 ONSC 3611 at para 15.

⁸⁶ *R v Barker*, 2019 NSPC 24.

gave in to the pressure that the perpetrators placed on her. The mother was living with the perpetrators and dependent upon them for her care.

The perpetrators made off with over \$50,000.00, leaving the mother on the hook for repayment of the loans.

The Court noted that a non-violent theft or fraud will be regarded typically as less serious than a violent one:

but not always . . . Violence or threats of violence are not needed when one seeks to exploit someone who is elderly and infirm or incapacitated. Breach of trust which enables elder abuse may be as serious as employing violence against someone capable of putting up a fight.⁸⁷

After looking at both the aggravating and mitigating factors, the Court ultimately decided to suspend the passing of sentence on the perpetrators and placed them on probation for terms of three years each, starting with 6 months of house arrest and restitution of amounts taken.

Further they were to co-operate with any lawyer representing the mother to have the fraudulent loan documents set aside or voided and to assume responsibility for any obligations arising from the documents. They were also not allowed to contact the mother without the mother's prior approval and the approval of her guardian.

9. CONCLUSION

As elder 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

⁸⁷ *R v Barker*, 2019 NSPC 24 at para 13.

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.

10. RESOURCES

WEL Partners Resource Centre: <http://welpartners.com/resources/>

CBA Elder Law Section Website: http://www.cba.org/cba/sections_Elder/main/

OBA Elder Section Website: <https://www.oba.org/Sections/Elder-Law>

Advocacy Centre for the Elderly: www.advocacycentreelderly.org

National Initiative for the Care of the Elderly (NICE): <http://www.nicenet.ca/> (Toolkits for identifying elder abuse)

British Columbia Law Institute's Canadian Centre for Elder Law: www.bcli.org (A Practical Guide to Elder Abuse and Neglect Law in Canada (2011), Report on the Common-Law Tests of Capacity (2013) Background Paper: Financial Abuse of Seniors – An Overview of Key Legal Issues and Concepts (2013))

Western Canada Law Reform Agencies: "Enduring Powers of Attorney: Areas for Reform" (2008) online at www.law.ualberta.ca

Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse" (Edmonton: February 2003), online at www.law.ualberta.ca

Law Commission of Ontario, A Framework for the Law as it affects Older Adults: Advancing Substantive Quality of Older Persons through Law, Policy and Practice (Toronto: April 2012) <http://www.lco-cdo.org/en/older-adults-final-report>

Canadian Network for the Prevention of Elder Abuse (CNPEA): www.cnpea.ca

This paper is intended for the purposes of providing information and guidance only and is not intended to be relied upon as the giving of legal advice, nor is it exhaustive.

Kimberly A. Whaley, Whaley Estate Litigation Partners,

September 2019

APPENDIX “A” Provincial / Territorial Legislation

Alberta

The Adult Guardianship and Trusteeship Act, SA 2008 c A-4.2

Protection Against Family Violence Act, RSA 2000, c P-27

Protection for Persons in Care Act, SA 2009 c P-29.1

British Columbia

Adult Guardianship Act, RSBC 1996,c 6

Adult Guardianship Act, Designated Agencies Regulation, BC Reg 19/2002

Community Care and Assisted Living Act, Residential Care Regulation, BC Reg 96/2009,
Schedule D

Adult Guardianship (Abuse and Neglect) Regulation, BC Reg 13/2000

Public Guardian and Trustee Act, RSBC 1996, c 383

Health Professions Act, RSBC 1996, c 183

Personal Information Protection Act, RSBC 2003, c 63

Freedom of Information and Protection of Privacy Act, RSBC 2003 c 165

Manitoba

Protection for Persons in Care Act, CCSM, c P144

Vulnerable Persons Living with a Mental Disability Act, CCSM c V90

The Domestic Violence and Stalking Act, CCSM c D 93

New Brunswick

Family Services Act, SNB 1980, c F-2.2

Personal Health Information Privacy and Access Act, SNB 2009, c P-7.05

Public Trustee Act, SNB 2005 c P-26.5

Newfoundland

Adult Protection Act, SNL 2001, c A-4.01

Family Violence Protection Act, SNL 2005, c.F-31

Personal Health Information Act, SNL 2008 c P-7.01

Access to Information and Protection of Privacy Act, SNL 2002, c A-1.1

Nova Scotia

Adult Protection Act, RSNS 1989, c 2

Protection for Persons in Care Act, SNS 2004 c 33

Domestic Violence Intervention Act, SNS 2001, c 29

Ontario

Long-Term Care Homes Act, SO 2007, c8

Substitute Decisions Act, 1992, SO 1992, c 30

Health Care Consent Act, 1996, SO 1996, c 30 Sch A

Mental Health Act, 1990, RSO 1990 c M7

Residential Tenancies Act, SO 2006 c 17

Consumer Protection Act, 2002 SO 2002 c 30, SchA

Freedom of Information and Protection of Privacy Act, RSO 1990, c F 31

Prince Edward Island

Adult Protection Act, RSPEI 1988, c A-5

Victims of Family Violence Act, RSPEI 1998, c V-3.2

Quebec

The Charter of Human Rights and Freedoms, RSQ c C-12, art 48

Public Curator Act, RSQ c. C-81

An Act respecting access to documents held by public bodies and the protection of personal information, RSQ c A-2.1

Professional Code, RSQ c C-26

Code of Ethics of Advocates, RRQ 1981 c B-1 r.1

Saskatchewan

Victims of Domestic Violence Act, SS 1994, c V-6.02

The Public Guardian and Trustee Act, SS 1983, c P-36.3

Yukon

Adult Protection and Decision Making Act, SY 2003, c 21 Sch A

Family Violence Prevention Act, RSY 2002, c 84

Public Guardian and Trustee Act, SY 2003, c 21 Sch. C, Part 2

Nunavut

Family Abuse Intervention Act, SNu 2006, c 18

Northwest Territories

Protection Against Family Violence Act, SNWT 2003, c 24