



CHECKLIST: FINANCIAL ABUSE UNDER A CONTINUING POWER OF ATTORNEY FOR PROPERTY (“CPOAP”)

Indicators of financial abuse by an attorney/fiduciary under a CPOAP:

- Changes in the grantor’s living arrangements (e.g., previously uninvolved relatives or new friends moving in, with or without senior’s permission)
- Unexplained or sudden inability to pay bills
- Poor living conditions in comparison with the grantor’s assets
- Changes in banking patterns due to pressure
- Changes in the grantor’s appearance
- Controlling a grantor’s spending
- Confusion or lack of knowledge about finances and signing or legal documents
- Being forced to sign multiple documents at once
- Being coerced into a situation where a grantor is being overworked and underpaid
- Unexplained disappearance of possessions
- Changes to a grantor’s CPOAP
- Necessities of life denied or not provided by the Attorney under a CPOAPC (ie., shelter, food, medication, assistive devices)
- Being overcharged for services or products by sales’ persons or providers
- Denying a grantor, the right to make independent financial decisions

A grantor may not report financial abuse because the grantor...

- feels shame or embarrassment because of having been victimized
- is fearful of the perpetrator or has a fear of the police or other authorities
- is dependent upon the perpetrator for the physical well-being
- wants to protect the abuser, especially if a family member
- may feel that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is their only family member or friend
- feels guilty for becoming a victim / they blame themselves
- may minimize, rationalize-away, or deny the abuse as a means of coping
- may not even recognize the impugned actions as abuse
- may not be able physically able to report financial abuse, even if having the desire to do so (e.g., the grantor may be suffering from dementia or lack of requisite mental capacity)

Civil Remedies

In a civil court case, the grantor (i.e., the plaintiff) must use evidence to prove on a *balance of probabilities* (i.e., that it is more likely than not) that the Attorney under a CPOAP caused the harm. Once it is proven that the Attorney committed the wrong, the civil court may order one or several remedies, such as:

- Removing an Attorney under a CPOAP
- Requiring the Attorney to account for their dealings with property
- Ordering the repayment of money appropriated or misappropriated from the grantor by the Attorney

- Declaring that certain property and/or assets belong to the grantor, or that the Attorney was only holding the property in trust for the grantor
- Ordering that a transfer of certain property be set aside, or that it is no longer valid
- Custodial sentence (available in some circumstances, such as a breach of trust)
- Ordering that the Attorney to vacate the property if living with the grantor without permission, or order that the Attorney pay rent
- Ordering that the Attorney pay legal costs and interest

Quasi-Criminal Remedies: *Habeas Corpus* Applications

- In cases where an elderly individual with cognitive disabilities (the “**Abductee**”) is removed from their home by one or more family members (the “**Abductors**”), who place the Abductee in a location they do not disclose to other members of the family, the extraordinary remedy of *Habeas Corpus* under the *Habeas Corpus Act*¹ (“**HCA**”) may be available
- The writ of *habeas corpus ad subjiciendum* (the “**Writ**”) originates in the common law and is a means of determining the validity of a person’s detention. Although it is used to retrieve individuals from detainment, the Writ is traditionally applied, and still most prevalent in, the criminal law context
- In bringing an application for a Writ, the applicant must provide notice of the application to the Attorney General at least 48 hours before making the application²

¹ RSO 1990, c H 1.

² *Ibid*, s. 1(2).

- Section 1(1) of the *HCA* sets out when a court may award the Writ

Criminal Remedies

There are several separate offences in the *Criminal Code*³ under which an Attorney under a CPOAP could be charged for misusing/abusing their power. Since these are criminal charges, all elements of the charge must be proven *beyond a reasonable doubt*.

Crimes associated with misuse and/or abuse by an Attorney:

- Section 215 Duty of Persons to Provide Necessaries of Life⁴
- Section 219 Criminal Negligence
- Section 329 Theft by Person Required to Account
- Section 331 Theft by Person Holding Power of Attorney
- Section 332 Theft
- Section 334 Theft over \$5,000
- Section 336 Criminal Breach of Trust (Conversion by Trustee)⁵
- Section 346 Extortion
- Section 366 Forgery
- Sections 386–388 Fraud

Sentencing Considerations:

Section 718 of the *Criminal Code* references a wide range of aggravating factors 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.

³ RSC, 1985, c C-46.

⁴ *Ibid*, s. 215(c).

⁵ See *Criminal Code*, *supra* note 5, s. 491.1(3) for order of restitution or forfeiture of property obtained by a crime.

How to Investigate misuse/abuse by an Attorney under a CPOAP:

Where an Attorney under a CPOAP has misused or abused their power, to pursue a remedy, you must gather **evidence** of money or property missing or unaccounted for.

Gathering Evidence—the grantor is capable:

- Obtain a copy of the CPOAP
- Let the grantor know they have a right to revoke the CPOAP—suggest that the grantor get legal advice about how to do so as soon as possible
- Obtain from the grantor financial particulars (e.g., the name of the attorney, name of the grantor’s bank, contact information at the bank branch and relevant account numbers, Old Age Security (“**OAS**”) and/or Canada Pension Plan (“**CPP**”) information, etc.)
- Upon authorization from the grantor, look for alternative sources of information (e.g., family members, friends, lawyers who may have represented the grantor when the CPOAP was signed, etc.)
- Obtain from the grantor a completed consent form for the release of financial records / bank information
- Contact the financial institutions immediately. Speak to a senior employee of the financial institution (e.g., a branch manager, customer service manager, etc.) and advise them that you are investigating the accounts of the grantor. Confirm with them that the information the grantor gave you is accurate
- Take a formal statement from the grantor (video, audio or written)

- Take the grantor's consent form to their financial institution(s), government offices (OAS, CPP) and ask when you will be provided with the pertinent financial records
- Identify other means of obtaining evidence (e.g., production order, search warrant, other judicial orders of suspect's account(s), records from retirement home or long-term care facility, etc.)

Gathering Evidence—the grantor is incapable:

- Consider enlisting the aid of other agencies, such as the Office of the Public Guardian and Trustee investigatory services
- Contact the relevant financial institution(s) immediately and request disclosure of required financial information as per the relevant privacy legislation and the decision of *R v. Lillico*⁶
- Attend financial institution(s) to gather pertinent financial records. Request that the financial institution(s) exercise “due diligence” in relation to the grantor's accounts from this point forward. Note that under certain circumstances, financial institution staff can release general information without a warrant
- Take a formal statement from the grantor (video, audio or written)
- Obtain consent from any person named as an Attorney under the CPOAP in order to retrieve financial records. If consent is not attainable, consider other means to obtain this information (e.g., a production order, search warrant, other judicial orders)

⁶ 1994 CanLI 7548 (ONSC), aff'd 1999 CanLII 2863 (ONCA).

Remember, conduct your investigation, and document evidence in a way that enables the Crown to recommend an increased penalty under appropriate sentencing provisions due to age related vulnerability of the grantor.

If a criminal charge is recommended or laid, consider having the accused resign as attorney for property. Their resignation could also be a condition of release.

If there is adequate evidence, recommend or lay the appropriate theft charge (e.g., theft under / over \$5,000, theft by power of attorney—see relevant sections of the *Criminal Code* noted above).

This checklist 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 and does not purport to be exhaustive. Dated March 11, 2022.