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**ELDER ABUSE: CIVIL AND CRIMINAL REMEDIES**

**By**

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## CONTENTS

1.	INTRODUCTION.....	1
2.	ELDER ABUSE: OVERVIEW.....	1
3.	CIVIL & CRIMINAL REMEDIES .....	5
4.	CIVIL REMEDIES.....	7
	a) “Removal” of an Attorney under a Continuing Power of Attorney for Property ....	8
	b) Order to “Account” (Produce Evidence of How the Money was Spent) .....	9
	c) Repay Money Improperly Taken .....	9
	d) “Set Aside” a Transfer of Title or Bank Account into Joint Names .....	9
	e) Restitution through Unjust Enrichment/Constructive Trust or Resulting Trust ...	10
	f) Setting Aside or Declaring a Predatory Marriage as “Void” .....	10
5.	COURT DECISIONS HIGHLIGHTING CIVIL REMEDIES .....	11
6.	PROVINCIAL/TERRITORIAL LEGISLATION .....	16
7.	CRIMINAL REMEDIES .....	18
8.	COURT DECISIONS HIGHLIGHTING CRIMINAL REMEDIES.....	19
9.	CONCLUSION .....	31
10.	RESOURCES.....	31

## 1. INTRODUCTION

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

Available civil and criminal remedies are 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.<sup>1</sup>

According to the Canadian Department of Justice, financial abuse is the most commonly *reported* type of abuse against older adults.<sup>2</sup> 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.<sup>3</sup> Financial

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<sup>1</sup> 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.

<sup>2</sup> Department of Justice, *Backgrounder Elder Abuse Legislation*, online: [http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc\\_32716.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32716.html)

<sup>3</sup> *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.<sup>4</sup> 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.<sup>5</sup> 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).<sup>6</sup> 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.”<sup>7</sup>

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

Elder abuse can involve:

- misusing a Continuing Power of Attorney for Property (“CPOAP”) which is a legal document where a person gives another the legal authority to make financial decisions on the grantor’s behalf;
- stealing an older adult’s money, pension cheques, or possessions;
- committing fraud, forgery or extortion;

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<sup>4</sup> 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>

<sup>5</sup> Ontario Provincial Police, *Tip Sheet on Abuse of Older Adults*, online:

<http://www.opp.ca/ecms/files/250363255.6.pdf>

<sup>6</sup> 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>

<sup>7</sup> [http://www.who.int/ageing/projects/elder\\_abuse/en/](http://www.who.int/ageing/projects/elder_abuse/en/)

- 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
  - Gift money to relatives, caregivers or friends
  - Engage in paid work to bring in extra money;<sup>8</sup>
- 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 POA (shelter, food, medication, assistive devices);
- Isolating the older adult to gain control;
- Domestic violence, physical or sexual abuse, and
- Predatory marriage.<sup>9</sup>

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;

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

<sup>9</sup> Where a person marries an older person in order to gain access to their money and assets.

- unexplained or sudden withdrawal of money from accounts;
- poor living conditions in comparison to the value of the assets;
- changes in banking patterns;
- changes in appearance;
- controlling spending;
- confusion or lack of knowledge about a financial situation and execution of legal documents;
- being forced to sign multiple documents at once, or successively;
- being coerced into a situation of overwork and underpay;
- unexplained disappearance of possessions (lost jewellery or silverware);
- changes in Power of Attorney (“POA”) documents;
- being overcharged for services or products by providers; or
- being denied the right to make independent financial decisions.<sup>10</sup>

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.<sup>11</sup> The abuser may rationalize the abuse thinking that they deserve the money as they are the older adult’s child.

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

<sup>11</sup> Laura Tambllyn Watts, “*Background Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts*” Canadian Centre for Elder Law, March 2013

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;
- 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 including the fact that 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; or, the prosecution takes so long that the victim dies before the case goes to trial; and, 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. Often, civil remedies are only available to those who can afford this costly process. Civil litigation can potentially take many years which an older frail adult may not have the luxury of enjoying. Lawyers similarly are costly. The time commitment required in the civil litigation process therefore poses practical problems since older adults have limited time and often limited means, amongst other barriers. It is easy to conclude that there is an under-reporting of abuse and we know this even from the abuse that we later see after death in estate administration and litigation. 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 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.

#### **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 happened. 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 some civil decisions, courts have signalled their willingness to order custodial sentences where necessary, especially in breach of trust cases. Another remedy available to a civil court is to make a “declaration” that real property or a bank account for example, beneficially belongs to the older adult, where a the perpetrator wrongfully assumed control of it.

In a civil court 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.

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

1. **Breach of fiduciary duty** by a substitute decision maker. For example, someone who is acting as an attorney, under a Power of Attorney for Property (“POA”), or under a Continuing Power of Attorney for Property (“CPOAP”) and must 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*. A fiduciary's actions are also governed by common law; and

2. **An “inadvertent” transfer of assets** whether money, or real property (houses, land, condos, cottages) or transfer of 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.

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

a) *“Removal” of an Attorney under a Continuing Power of Attorney for Property*

A *Continuing Power of Attorney for Property* is commonly used to make sure that the financial affairs of a person are looked after at a time when that person (the grantor) can no longer look after his/her affairs alone, either temporarily, as agent, and/or permanently when decisionally incapable. Much to the surprise of many, the CPOAP is effective **immediately** upon execution **unless** there is a provision or “triggering” mechanism in the document itself which says that it 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 a CPOAP has the power to **do anything** on behalf of the grantor that the grantor could do if capable, except make a Will. These powers are subject to legislative governance and various court-imposed conditions.

The *Substitute Decisions Act (the “SDA”)* particularizes the obligations and duties of an attorney under a power of attorney. The SDA prescribes the court procedure for holding

an attorney accountable for its actions. As noted, elder financial abuse often involves the misuse of powers granted under a Power of Attorney document. A Court can order that the attorney be removed as an attorney and can prohibit the grantee from acting as an attorney under a POA.

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

Another civil remedy to address any money wrongfully taken by an attorney under a CPOAP is to order an accounting be provided tracking all transactions undertaken for the grantor, i.e., to provide financial documents and back-up to show how he/she was spending the money. That process is called an “accounting”. At the hearing of an accounting application under the *SDA*, the civil court will consider the evidence and look at the accounts and the conduct of the attorney. Judges have broad discretion in an accounting application – they can make all manner of and inquiry into the conduct of the attorney. If it is found that the attorney failed to meet the obligations under the *SDA*, 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 Court finds that an attorney under a POAP or CPOAP improperly took money from the grantor or did not pursue another who for example did not repay a “loan” to the older adult, or committed civil fraud on the older adult etc., the Court can order the repayment of those amounts, plus interest, and legal costs incurred.

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

*e) Restitution through Unjust Enrichment/Constructive Trust or 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.

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. Marriage brings with it a wide range of property and financial entitlements. Marriage revokes a Will. 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 Court's often find that the older adult was capable even in the most obvious cases of exploitation.

## 5. COURT DECISIONS HIGHLIGHTING CIVIL REMEDIES

### **“Best Interests of Mother”<sup>12</sup>**

This case opens with the words of Abraham Lincoln: *“A house divided against itself cannot stand”*.

The mother suffers 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

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<sup>12</sup> *Carey v Carey*, 2018 ONSC 4564.

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 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 spends all of his mother’s \$42,000 per year pension income when she has 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 *Schaefers Estate*,<sup>13</sup> (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.

#### **“Go-Karts for Mother”<sup>14</sup>**

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

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

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

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

#### **“Of Course Mom Wanted Me to Have Her House”<sup>15</sup>**

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

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<sup>13</sup> (2008) 93 OR (3d) 447 (SCJ)

<sup>14</sup> *McMaster v. McMaster* 2013 ONSC 1115

<sup>15</sup> *Mroz v. Mroz* 2015 ONCA 171

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

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

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

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

#### **"The Son Who Tried to Steal His Mom's House"<sup>16</sup>**

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

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

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<sup>16</sup> *Servello v. Servello* 2015 ONCA 434



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

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

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

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

#### **“The Crooked Lawyer”<sup>17</sup>**

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

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.

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<sup>17</sup> *Zimmerman v. McMichael Estate* 2010 ONSC 2947

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

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

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

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

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

## **6. PROVINCIAL/TERRITORIAL LEGISLATION**

Besides remedies found under the *Criminal Code*,<sup>18</sup> 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

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<sup>18</sup> RSC 1985, c.C-46

- Domestic violence legislation
- The Quebec Charter of Human Rights and Freedoms
- Public Guardian and Trustee Legislation

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,<sup>19</sup> Yukon,<sup>20</sup> Prince Edward Island,<sup>21</sup> and New Brunswick.<sup>22</sup> 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*.<sup>23</sup> 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,<sup>24</sup> Alberta,<sup>25</sup> Manitoba,<sup>26</sup> Ontario<sup>27</sup> and Nova Scotia<sup>28</sup> 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

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<sup>19</sup> *Adult Guardianship Act*, RSBC 1996, c. 6

<sup>20</sup> *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A.

<sup>21</sup> *Adult Protection Act*, RSPEI 1988, c A-5

<sup>22</sup> *Family Services Act*, SNB 1908, c F-2.2

<sup>23</sup> *Adult Protection Act*, RSNS 1989, c.2

<sup>24</sup> *Community Care and Assisted Living Residential Care Regulation*, BC Reg 96/2009 Sched. D

<sup>25</sup> *Protection for Persons in Care Act*, SA, 2009 C.P-29.1

<sup>26</sup> *The Protection for Persons in Care Act*, CCSM, c P144

<sup>27</sup> *Long-Term Care Homes Act*, SO 2007, c8

<sup>28</sup> *Protection for Persons in Care Act*, SNS 2004 c 33

duty to report to a PGT. In Yukon,<sup>29</sup> BC,<sup>30</sup> Alberta,<sup>31</sup> Saskatchewan,<sup>32</sup> Ontario<sup>33</sup> and Quebec<sup>34</sup> 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, the laws were made to protect people 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*<sup>35</sup> 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 under:

- **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;**

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<sup>29</sup> *Public Guardian and Trustee Act*, SY 2003, c 21 Sch C, Part2 s.9(1)

<sup>30</sup> *Public Guardian and Trustee Act*, RSBC 1996, c 383 s.17

<sup>31</sup> *The Adult Guardianship and Trusteeship Act*, SA 2008, cA-4.2 ss75-77

<sup>32</sup> *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 s40.7

<sup>33</sup> *Substitute Decisions Act*, SO 1992, c 30, s27.

<sup>34</sup> *Pubic Curator Act*, RSQ, c C-81

<sup>35</sup> RSC 1985, c. C-46

- **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;**
- **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*<sup>36</sup> 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**

***R v Siwicki* – 2018 – Winnipeg, MB – Section 220 (Causing death by criminal negligence) Section 215 (failure to provide the necessaries of life)**

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<sup>36</sup> SC 2015 c 13 s 2

Ronald Siwicki entered a guilty plea to criminal negligence causing the death of his 89-year-old mother.<sup>37</sup> This decision dealt with his sentencing.

Siwicki lived with his mother and was her sole caregiver. 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 could have been successfully treated and would have caused her significant pain. 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 at home. He testified that he tried 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. Counsel also agreed that the facts of the situation amounted to the offence of failing to provide the necessities of life as well, and most of the case law provided on the sentencing hearing dealt with this offence.

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<sup>37</sup> 2018 MBQB 115 (CanLII)

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 factor (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 (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. Fernandez initially denied, yet later admitted, committing the offence during his presentence report stating 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.

***R v Bernard* – 2015 - Surrey, BC – Section 380 (1) (a) (Fraud over \$5000)**

Joseph Bernard<sup>38</sup> 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

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<sup>38</sup> 2015 BCPC 107.

that he defrauded his victim. Not only did he steal from the older adult, at the time the fraud was discovered by the older adult's sister-in-law, the house was in a "deplorable state", there was no food in the refrigerator, and the older adult was malnourished and had to be taken to the hospital.

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

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

[47] The present case involves a breach of trust of certainly a very high nature. Mr. Crouter [the older adult] had confidence in Mr. Bernard [the fraudster], not only to live in his house and share living space without defrauding him, but to 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”.<sup>39</sup> The fraudster was sentenced to **4 years** in custody.<sup>40</sup>

***R v Kaziuk – 2011 - Oakville, ON - Section 334 (Theft), 380 (Fraud), 331 (Theft by Person Holding a Power of Attorney)***

This case<sup>41</sup> is interesting because although section 331 was enacted as long ago as 1984, this is one of only a few reported decision in Canada citing s. 331 in the context of abuse of older adults, and in the end, the accused was not even charged under 331. Instead, he was charged under the regular theft and fraud provisions. That said, Justice Baldwin *"found that the s.331 offence had been proven by the Crown beyond a reasonable doubt"* and that even though the accused was not charged with this offence it was an *"aggravating sentencing factor pursuant to s.725(1)(c) of the Criminal Code"*.

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

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

*This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim....The victim was his elderly Mother who was extremely vulnerable to him as her only child. ...Mr. Kaziuk would rip-off the wings of all the angels*

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<sup>39</sup> 2015 BCPC 107 at para. 65.

<sup>40</sup> 2015 BCPC 107 at para. 66.

<sup>41</sup> 2011 ONCJ 851

*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.*”<sup>42</sup> 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.<sup>43</sup>

### ***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.<sup>44</sup> 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.

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<sup>42</sup> *R v. Kaziuk* 2013 ONCA 217

<sup>43</sup> *R v. Kaziuk* 2013 CanLII 64666 (SCC)

<sup>44</sup> *R v. Taylor*, 2012 ONCA 809

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 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, British Columbia – S. 380(1) (Fraud)**

The British Columbia Court of Appeal granted leave to appeal the sentence of Mr. Cousineau, who was convicted of three counts of fraud under section 380(1), and was sentenced to 18 months in jail and two years' probation.<sup>45</sup> The advanced age and vulnerability of his victims was considered as an aggravating factor in the court's sentencing.<sup>46</sup> Mr. Cousineau was employed by a seniors' facility to market the residence. On three occasions he met with potential residents and pocketed their rent deposits. In addition to the penal sentence, the court also ordered Mr. Cousineau to repay \$7,357.00 and to pay victim surcharges in the amount of \$300.00.

Mr. Cousineau's appeal related only to the monetary components of his sentence. Interestingly, leave appears to have been granted on the basis of a technicality. Mr.

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<sup>45</sup> R. v. Cousineau, 2013 BCCA 289

<sup>46</sup> R. v. Cousineau, 2013 BCSC 947 at 11 and 25.

Cousineau was self-represented on his application for leave to appeal. The Crown took the position that his appeal lacked merit, and the Court agreed. However, the Crown neglected to request an order refusing leave to appeal, so leave was granted.<sup>47</sup> However no appeal decision has been reported.

### ***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.<sup>48</sup>

This case, ***R. v. Davy***, 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 (s.215). The mother lived with her daughter and son-in-law and she suffered from severe dementia and from other serious medical conditions and was incapable of making personal care (and other) decisions for herself.

When the police received a call to the house they found the overpowering smell of cat urine, the presence of filth and feces, and the entire house was in complete squalor. The mother was found naked on a bare mattress in room with blacked out windows, covered in her own vomit. She looked like a skeleton covered with skin. When examined by health

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<sup>47</sup> *R. v. Cousineau*, 2013 BCCA 289.

<sup>48</sup> Laura Tamblin 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

care professionals she was dehydrated, emaciated, anemic, and suffered from internal bleeding and had a fractured right hip. She died shortly thereafter at the age of 77.

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

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

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

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

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

Hooyer had helped the couple with chores around the house, drove them to appointments etc. The husband developed dementia and was moved into long term care facility. The wife was his attorney for property until she died. Hooyer was the substitute attorney for property and the named residual beneficiary in the 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 was not buying this. An attorney is a fiduciary with fiduciary duties and obligations that he should have known of his responsibilities. The Court found Hooyer knew the assets belonged to the husband when he used them for his own benefit.

On the theft charge he was sentenced to **2 years less a day** and ordered to pay \$378,552.67 in restitution to the husband's estate (the husband died in 2013). On the fraud charge he was sentenced to **6 months** in prison to be served concurrently with the theft charge and ordered to pay full restitution to VAC. His appeal of his conviction and sentences was dismissed.

***R. v. Curreri* – 2017 - Toronto, Ontario – S.380 (1)(a) – Fraud over \$5,000**

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

The son was assisted in his fraud by a legal assistant at a real estate law firm. Both were found guilty in June 2016. 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.<sup>49</sup> The Law Society also disciplined a lawyer for being duped by the son and the assistant and admitted to professional misconduct and was fined \$25,000.00.

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

A daughter stole over \$300,000 from her elderly mother's bank account from 2009-2013.<sup>50</sup> She did this after her mother gave her access to her bank account to pay some of her bills. From here the daughter took over all of her mother's finances. The mother trusted her completely. As the daughter took the money out in cash (up to \$10,000 a month) there was no way to trace how the money was spent. The daughter had various explanations including that she spent it on her cocaine addiction, trips, and shopping for lingerie. Shortly after being informed of the theft the mother was admitted to the hospital for heart problems attributed to stress. She died before sentencing was completed. The daughter pled guilty to one count of theft of monies and was sentence to **30 months** incarceration

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

A daughter was charged with three offences.<sup>51</sup> The first two charges allege that, being entrusted with a Power of Attorney for Property of her father, she (1) stole money exceeding \$5000 and 2) defrauded him of money exceeding \$5000. The third charge alleges that, being the trustee of money for her father's benefit, she converted money to a use not authorized by the trust, contrary to section 336. (It is not clear, once again, why she was not charged under s.331, Theft by a Person Holding a Power of Attorney.)

The daughter had used her father's money to pay her own personal bills which caused him to default on payments to the long term care facility where he was residing. That facility took no steps against him however, as the daughter repaid the entire amount after the charges were laid. The question before the court was whether the daughter took the

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<sup>49</sup> 2017 ONSC 5652.

<sup>50</sup> *R. v. Reynolds* 2016 BCPC 69

<sup>51</sup> *R.v. Bruyns* 2016 ONCJ 207

money with an “honest but mistaken belief” that she was entitled to loan his money to herself in these particular circumstances. The POA document had a clause that stated:

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

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

The Court disagreed. When the father had loaned her money in the past it had not caused him to go into debt or to default on his other financial obligations, unlike the current “loan” to the daughter. Past loans also did not put him at risk of being denied any services, such as those that the long term care facility provided. There was no 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.<sup>52</sup>

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<sup>52</sup> 2016 ONCJ 527



## 9. CONCLUSION

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

## 10. RESOURCES

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

CBA Elder Law Section Website: [http://www.cba.org/cba/sections\\_Elder/main/](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](http://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 Abuse: [www.bcli.org](http://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](http://www.law.ualberta.ca)

Alberta Law Reform Institute, “Enduring Powers of Attorney: Safeguards Against Abuse” (Edmonton: February 2003), online at [www.law.ualberta.ca](http://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>

*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 2018*

## 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