

Financial Elder Abuse: Civil vs. Criminal Remedies

The Professional Advisory Group of the
Baycrest Foundation Breakfast Seminar
November 7, 2018



Introduction

- Remedies (ways to “right the wrong”)
- Provincial laws
- *Criminal Code*
- Civil proceedings (private parties)
- When civil? When criminal?



Overview of Elder Abuse

- Financial abuse most common
- Under reporting is an issue
- Often at hands of family member



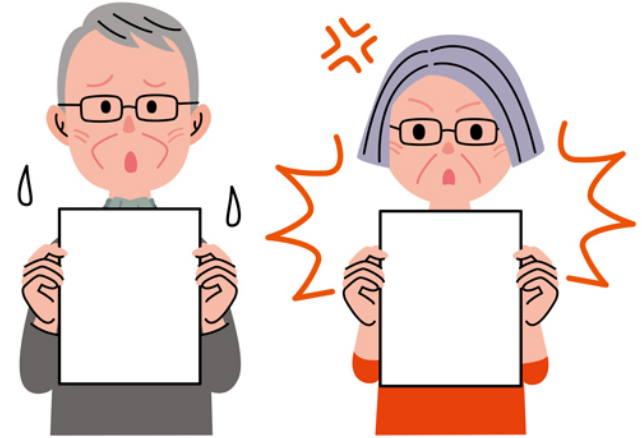
Definition

“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”

- World Health Organization

Examples:

- Misusing a Power of Attorney
- Stealing
- Fraud, forgery, extortion
- Undue pressure on older adult to do something they do not want to do, etc.



Examples

- Domestic abuse, physical, mental or sexual
- Predatory marriages
- Withholding access to grandchildren
- Failure to provide necessaries of life



Indicators or “Red Flags”

- Changes in living arrangements
- Unexplained inability to pay bills
- Unexplained withdrawal of \$\$
- Changes in appearance
- Changes in spending
- Being overcharged for services or products, etc.



Perpetrators

- Adult children (who have their own issues)
- Service providers
- Strangers
- Spouses



Why Under-Reported?

- Shame or embarrassment, “stigma”
- Fearful
- Dependence
- Want to protect the abuser
- Guilt
- Lack of capacity



REMEDIES?

Civil vs. Criminal



Criminal or Civil?

- Elder financial abuse does not always attract criminal charges
- Police may decline to investigate under mistaken belief not criminal
- Several under-utilized sections of *Criminal Code*



Differences:

■ Civil

- Private parties
- Anyone can start claim
- Costly and lengthy
- Restitution / Repayment
- “Balance of Probabilities”

■ Criminal

- Crown and accused
- Crown initiates
- Funded by government
- Incarceration
- “Beyond a Reasonable Doubt”

Other Legislation – Prov or Territorial

- Adult protection laws
- Public Guardian and Trustee
- Legislation protecting adults living in residential care
- Domestic violence
- Human Rights

CIVIL REMEDIES

And Real Life Cases



Common Civil Remedies:

Stop someone from acting as an attorney under a Continuing Power of Attorney for Property:

- Extensive powers
- Effective immediately
- Civil Court can order removal



Common Civil Remedies:

Make an attorney explain where the money went:

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

Common Civil Remedies:

Make someone repay the money taken:

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



Common Civil Remedies:

Declare a transfer of property invalid:

- Joint tenancy risks – “rights of survivorship” unintended
- Bank accounts and real property
- Older adult did not intend property to go to child

Common Civil Remedies:

Restitution – Through Unjust Enrichment / Constructive Trust / Resulting Trust

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

Common Civil Remedies:

Void or set aside a predatory marriage:

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

Common Civil Remedies:

Others: Breach of Contract, Tort of Civil Fraud

- But...there are evidentiary issues in proving these claims

Real life cases:

“Best Interests of Mom”

- Sons removed as attorneys under POAs
- Pawned mother’s jewellery, failed to account for her pension \$\$, kept her from siblings
- BUT no evidence of elder physical abuse as alleged:
Police wellness visits

Real Life Cases:

“Go-Karts for Mother”

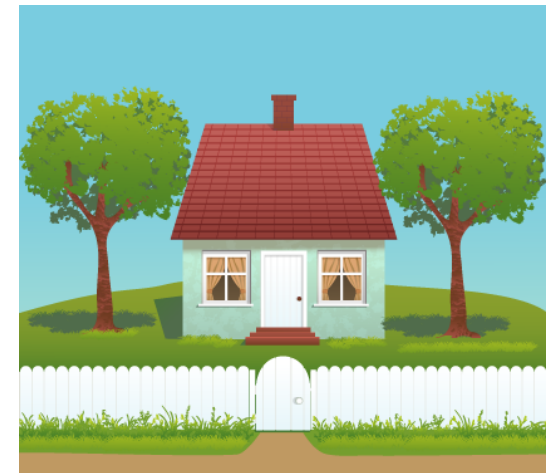
- Mother neglects to tell one son he is her joint attorney with his brother
- Brother invests \$2 million of mother’s money into dubious business ventures – go-kart businesses
- Loses money
- Court removes brother as attorney and orders him to pay back \$



Real Life Cases:

“Of Course Mom Wanted Me to Have Her House”

- Older adult transfers house into joint names with daughter
- Daughter sells house and keeps all proceeds when mother dies
- Will says grandchildren were to receive money
- Court: Mother did not gift house to daughter



Real Life Cases:

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

- After father died, took mother to registry office
- Transferred title into joint names
- Mother thought she was signing a CPOAP
- Mother’s English was limited
- Son refused to transfer house back
- No ILA

Cont.

- The civil court:
 - Transfer set aside
 - A “textbook example” of child unduly influencing parent
 - Mother required independent legal advice

Real Life Cases:

“The Crooked Lawyer”

- McMichael Art Collection
- Night her husband died – consoled her and had her sign a CPOAP, he was sole attorney for property
- Used her assets as his own while she was still alive- depleted estate
- Did not notify charity after death/executor



Cont.

- Expensive dinners
- New clothing
- Limousines
- Sailing trips to Bermuda
- Used her BMW
- Put her valuable art collection on his own walls
- Lost art etc.

Cont.

- Paid himself over \$350,000 CAD and \$85,000 USD
- Court ordered money to be paid back
- Incarcerated-failed to account-contempt of court
- Died shortly after case (in a Hot Tub!?)



CRIMINAL REMEDIES

And Real Life Cases



Criminal Code

- Failure to provide the necessaries of life (s.215)
- Criminal Negligence(s.219) Causing Death (s.220)
- Uttering Threats (s.264.1)
- Physical or Sexual Assault (ss.265&271)
- Unlawful Confinement (s.279)
- Theft by a person holding a power of attorney (s.331)
- Theft (s.332)

Criminal Code Cont.

- Criminal Breach of Trust (s.336)
- Forgery (s.366)
- Theft or forgery (credit card) (s.342)
- Stopping mail with intent (s.345)
- Extortion (s.346)
- Forgery (s.366)
- Fraud (s.386-388), Intimidation (s.423)

Criminal Remedies: Sentencing

Sentencing Principals:

- S.718
- Age and / or disability
- Abusing position of trust
- Lengthier sentence

Criminal Remedies: Sentencing

R. v. Kralik

“In my view, abuse of a frail, isolated elderly person, particularly an elderly person who was ‘not as sharp as she once was’ can be considered an aggravating factor”

Criminal Remedies: Victim Bill of Rights

Canadian Victim Bill of Rights – 2015

- Provides clear rights for victims of crime
- Right to information, participation, protection and restitution

Real Life Cases

***R v Siwicki* 2018 (Winnipeg) Criminal Negligence Causing Death (s.220) of his mother**

- Police found body on floor in hall, feces, urine
- Died of sepsis from bedsores after a fall
- Plead guilty, took responsibility
- 3 months in jail

Real Life Cases

***R v Fernandez* 2018 (Brampton) Assault Causing Bodily Harm**

- PSW punched a 97-year-old woman
- Initially denied, then admitted after being found guilty
- Sentenced: 6 months to be served in community (plus conditions: no contact over 65 years)

Real Life Cases

R v Bernard 2015 (Surrey, BC) (Fraud)

- Window washer weaseled his way into widower's home
- Withdrew \$500/day from Visa
- Left victim in deplorable state, malnourished and needed hospitalization
- Sentence: 4 years

Real Life Cases

R v Kaziuk 2011 (Oakville, ON) (Fraud, Theft)

- Used a CPOAP granted by mother to take out mortgages on her properties
- Defaulted and left her penniless and homeless
- 10 years reduced on appeal to 8 years



“he would rip off the wings of angels in heaven and sell them to the devil for his own gain”

Real Life Cases

***R v Taylor* 2012 (Burlington, ON) (Fraud)**

- Elderly frail woman executed CPOAP in favour of her caregiver
- Caregiver obtained a bank card and withdrew \$126,000.00
- Sentenced to 21 months in prison

Real Life Cases

***R v Davy* 2015 (Orillia, ON) (Failure to Provide Necessaries of Life s.215)**

- Legal duty to provide – under a person’s “charge”:
 - a) Unable to withdraw from charge due to age, illness, mental disorder etc.
 - b) Unable to provide for themselves

R v Davy cont.

- Daughter and son-in-law attorneys for personal care of elderly mother
- Charged with failing to provide the necessaries of life
- Cat urine, filth & feces, squalor, deplorable conditions
- Clear case of elder abuse
- Sentenced to 12 months each

Real Life Cases

***R v. Hooyer* 2016 (Simcoe, ON) (Theft by POA & Fraud)**

- Over \$300,000 stolen – bought himself a Hummer, a friend a Mustang, etc.
- Claimed he was “told he could use the money as his own”
- Fiduciary duties & Obligations
- 2 years less a day & 6 months concurrently (plus restitution)



Real Life Cases

R v. Curreri (Toronto, ON) (Fraud)

- Transferred father's property out of his name into names of strangers
- Mortgaged the properties
- Assisted in fraud by lawyer and legal assistant – house arrest
- Lawyer fined \$25,000.00

Real Life Cases

***R v. Reynolds* 2016 (Victoria BC) (Theft)**

- Daughter stole \$300,000 from elderly mother's bank account
- Cocaine addiction, lavish trips and expensive lingerie
- Mother trusted her completely
- 30 months incarceration



Real Life Cases

***R v. Bruyns* (Oakville, ON) (Theft, Fraud, Criminal Breach of Trust)**

- Daughter “loaned” herself \$\$ under POA
- Caused father to default on payments
- “honest but mistaken belief?": No
- 18 months probation, removal as attorney

Conclusion



Keep eye out



Be aware of red flags



Criminal where appropriate



Civil with lesser burden

Resources

- WEL Partners Resource Centre: <http://welpartners.com/resources/>
- CBA Elder Law Section: www.cba.org/cba/sections_Elder/main/
- Advocacy Centre for the Elderly: www.advocacycentreelderly.org
- National Initiative for the Care of the Elderly (NICE): www.nicenet.ca/
- BC Law Institute's Canadian Centre for Elder Abuse: www.bcli.org
- 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 <http://www.lco-cdo.org/en/older-adults-final-report>

THANK YOU!
Questions?

