CIVIL AND CRIMINAL REMEDIES
ELDER ABUSE

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Iranian Canadian Legal Professionals Conference

March 9, 2018

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INTRODUCTION

When abuse of older adults is suspected, remedies can be sought under provincial laws (such as legislation governing property, guardianship, capacity, health, and social services), as well as federally, including for instance, under the *Criminal Code* RSC 1985, c C46. Civil proceedings can be commenced in addition to criminal proceedings and the two sets of proceedings could potentially continue at the same time. Civil remedies can be pursued alone as a means of recovering property, seeking restitution, and obtaining damages.

Available civil and criminal remedies are not often well understood. The differences between the two procedural avenues and when one type of remedy might be more suitable than another will be explored.

ELDER ABUSE: OVERVIEW

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

In many Canadian jurisdictions at least one key organization/agency has developed or otherwise has adopted a definition of elder abuse and neglect. For the most part, the definitions contain two components: a general definition of elder abuse followed by an enumeration of the types of abuse and neglect (for example psychological and physical).[1]

The Advocacy Centre for the Elderly (ACE) in Toronto, defines elder abuse as “harm done to an older person by someone in a special relationship to the older person”. And that elder abuse includes:

- Physical abuse such as slapping, pushing, beating or forced confinement;

[1] Department of Justice, Legal Definitions of Elder Abuse and Neglect, online: http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p23.html

- Financial abuse such as stealing, fraud, extortion or misusing a power of attorney;
- Sexual abuse as sexual assault or any unwanted form of sexual activity;
- Neglect as failing to give an older person in your care food, medical attention, or other necessary care or abandoning an older person in your care; and
- Emotional abuse as in treating an older person like a child or humiliating, insulting, frightening, threatening or ignoring an older person.[2]

The World Health Organization defines "elder abuse" as: "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."[3]

According to the Canadian Department of Justice, *financial abuse* is the most commonly reported type of abuse against older adults.[4] However, the Department of Justice also commented on the difficulty in estimating the prevalence and incidence of elder abuse in Canada due to obvious factors associated with under-reporting.[5] Financial abuse can look like anything including improper use of 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.[6] 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. Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust (where there

[2] Advocacy Centre for the Elderly, Elder Abuse, online: http://www.advocacycentreelderly.org/elder_abuse_-_introduction.php
[3] World Health Organization, Elder Abuse, online: http://www.who.int/ageing/projects/elder_abuse/en/
[4] Department of Justice, An Empirical Examination of Elder Abuse: A Review of Files from the Elder Abuse Section of the Ottawa Police Service, online: http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr13_1/p1.html *Backgrounder Elder Abuse Legislation*, online: https://www.canada.ca/en/news/archive/2012/03/elder-abuse-legislation.html
[5] *Ibid*.
[6] 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 .

is a power imbalance).[7] 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 other necessaries of life.

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."

Overall, 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;
- 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; and
    - Engage in paid work to bring in extra money[8]

[7] 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
[8] 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

- 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 necessaries 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.[9]

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;
- being forced to sign multiple documents at once, or successively;

[9] Where a person marries an older person in order to get access to their money and assets.

- 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; and/or
- being denied the right to make independent financial decisions.[10]

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). Often adult children who cause harm to their parents suffer from various health, mental health, substance abuse, social isolation, and employment issues of their own and are financially dependent on the older person.[11] 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;
- 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;

[10] 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

- 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 harm to the family's reputation or honour; and/or
- being resistant to having strangers in the home to provide services that the abuser does.

CIVIL & CRIMINAL REMEDIES

Once an abuse is reported or discovered, there are two legal avenues that can be pursued in remedying elder abuse: civil law proceedings or criminal prosecutions.

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 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. For reasons noted above, a victim may be unable or unwilling to extricate him/herself from the presence of undue influence and may refuse ultimately to report a

[11] Laura Tamblyn Watts, "*Background Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts*" Canadian Centre for Elder Law, March 2013

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 civil. However, as we seek to demonstrate there are several sections of the *Criminal Code* that may well be under-utilized due to this misperception that such matters are best suited to civil recourse rather than criminal recourse.

While anyone can start a civil action (as opposed to relying on the Crown to press charges), there are still many barriers to achieve justice for victims. Often, civil remedies are only available to those who can afford the, often, cost prohibitive 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. There is likely an under-reporting of abuse and we know this even from the abuse that we later see after death. 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 also a number of federal and provincial/territorial laws that may apply to the abuse of seniors. Apart from the *Criminal Code*, at the federal level, privacy legislation also comes into play. 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.

CIVIL REMEDIES

Civil remedies are mainly about restitution, i.e. putting 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 of “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 there may not be any 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 the perpetrator wrongfully assumed control of it.

Civil court cases are also decided on the civil standard of "balance of probabilities" rather than the criminal standard of "beyond a reasonable doubt". This difference in evidentiary requirement is one way to determine which remedial route to take: 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) on a "balance of probabilities" may well be more achievable.

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, or under a Continuing Power of Attorney for Property must fulfill certain ethical, moral and legal duties. 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.

2. **An "inadvertent" transfer of assets:** Whether money, or real property (houses, land, condos) or transfer of property rights or beneficial rights, by a vulnerable adult to another person. One way this happens is through the transferring 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 get all the property rights of a spouse.

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

1. Removal of an Attorney under a Continuing Power of Attorney for Property

A Continuing Power of Attorney for Property (CPOAP) 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 will only 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 for property. The *SDA* provides for 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. However removing an attorney can be difficult as courts are reluctant to interfere with an older adult's choice of attorney. The SDA not only has the goal of protecting the incapable and vulnerable but also to protect a person's right to choose who will make property and financial decisions on their behalf. The two part test that must be met to remove an attorney was set out in *Teffer v. Schaefers* (2008), 2008 CanLII 46929 (ON SC), 93 OR (3d) 447 (SC) at paras. 24-25 and recently applied or discussed in *Abel v. Abel* 2017 ONSC 7637, *Groh v. Steele* 2017 ONSC 7637 and *White v. White* 2017 ONSC 4550:

i. There must be strong and compelling evidence of misconduct or neglect on the part of the attorney before a court should ignore the clear wishes of the donor; and

ii. The court must be of the opinion that the best interests of an incapable person are not being served by the attorney.

2. Order to Pass Accounts (Produce Evidence of Showing How the Money was Spent)

Another civil remedy to address any money wrongfully taken by an attorney under a CPOAP is to obtain an order requiring 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 (often called "passing of accounts", "passing" and "accounting". While an attorney is required to keep accounts, an attorney is not required to pass those accounts; however, the Court may order that all, or a specified part and/or period of the accounts of an attorney be passed.[12] 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 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 *Substitute Decisions Act,* it is open to the court to make a finding that there has been a breach of fiduciary duty.

3. 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. Punitive or aggravated damages may also be awarded.

[12] *Substitute Decisions Act*, *1992,* SO 1992, c 30, section 42(1) to 42(8).

4. 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.

5. 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. This may occur where an abuser has been unjustly enriched, where a benefit has been given to the abuser (perhaps the older adult cleaned the abuser's house or made payments on their mortgage expecting to be compensated or made joint tenants on title), to the detriment of the older adult (older adult was not compensated), 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 find that property the abuser has is being held in trust for the older adult.

6. 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. Also, marriage revokes a Will. The overriding problem with predatory marriages is that they are not easily challenged at law.

The traditional way is to argue that the older adult did not have the 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.

These criteria are often easily met and Court's have found that older adults were capable even in the most obvious cases of exploitation. Two recent cases however have set aside marriages as void ab initio as one of the parties to the marriage lacked the requisite capacity to marry.

In one decision, ***Devore-Thompson v. Poulain***, 2017 BCSC 1289, a claim to set aside the marriage was brought by a family member after the death of the incapacitated party. The Court also set aside two Wills based on the testator's lack of testamentary capacity. This lengthy decision (74 pages) is the first case since the 2014 case of *Ross-Scott v.*

Potvin[13] to provide further ammunition on remedying the now out of date common law treatment of decisional capacity to marry.

Ms. Walker was an older adult, who had no children but was close to her niece. She was a strong independent woman until she was diagnosed as having Alzheimer's disease in 2005. According to those close to her, Ms. Walker's condition progressively deteriorated in the years following her diagnosis, to the point where she forgot how to use utensils and a phone, could no longer cook, forgot who people were, and could not clean or care for herself. Ms. Walker, however, refused to acknowledge her declining health and insisted on remaining independent. Her niece, the Plaintiff in this case, loved her aunt dearly and increasingly assisted her aunt to live independently as long as possible.

Unknown to Ms. Walker's caring niece, while Ms. Walker's health was deteriorating significantly she was being "preyed on"[14] by a younger man for financial gain.

Ms. Walker met this man, Mr. Floyd Poulain in 2006 at the local mall when he asked her for five dollars and her address and phone number. Ms. Walker and Mr. Poulain went on to have dinner together and this began Mr. Poulain's "campaign".[15]

Unbeknownst to her family and friends, Mr. Poulain took Ms. Walker to a lawyer in 2009 for Ms. Walker to execute a new Will. The lawyer testified at the trial but had to rely on his "sparse notes" as he could not recall the meeting. His notes indicated that Mr. Poulain remained with Ms. Walker while she was meeting with the lawyer. The evidence demonstrated that the 2009 Will was prepared from handwritten notations to a previous Will. The notations were in Mr. Poulain's handwriting. The notes struck out the appointment of Ms. Walker's friend as executor and inserted "Floyd S. Poulain". Mr. Poulain also struck out the gift of Ms. Walker's car to her nephew with the instruction

[13] 2014 BCSC 435.

[14] *Devore* at para.4.
[15] *Devore* at paras. 255 & 329.

"omit" (as Mr. Poulain had already taken over Ms. Walker's car). There was also a note "to make power of attorney Floyd S. Poulain."

Madame Justice Griffin, in her decision, noted "*I find there to be a high probability that Ms. Walker sat in front of [the lawyer] and pretended to know what was going on by nodding and smiling a lot and saying very little. Others noted her smiling a lot and Ms. Walker was quite determined not to let on that she was having cognitive difficulties*."[16] Justice Griffin found difficulty placing any weight on the evidence provided by the lawyer; noting that nothing in his evidence suggested that based on his standard practices he was able to detect Ms. Walker's testamentary capacity.

Ms. Walker and Mr. Poulain were married in June of 2010. Ms. Walker did not inform any of her family members that she intended to marry Mr. Poulain. In fact, she had expressed that she did not intend to remarry. The marriage caught her close family members and her treating physician completely off guard. Mr. Poulain testified that it was Ms. Walker's idea.

Mr. Poulain was unable to recall any material details of the wedding under cross-examination; including who the witnesses were (they were supplied by the marriage commissioner). There was one photograph produced at trial where Ms. Walker and Mr. Poulain were together and her facial expression was vacant. The marriage commissioner's evidence was unhelpful on the issue of whether Ms. Walker had capacity to marry as he could not remember the marriage ceremony and does hundreds of ceremonies. He had "no practice of testing for capacity" (the Court noted that "it is not suggested he should have") and simply asks the parties to say "I do not" and "I do" to the standard questions.[17]

Justice Griffin noted it was likely that Ms. Walker was prompted on what to say at the ceremony and went along with it and the fact that the marriage ceremony took place is of little help in determining capacity.

[16] *Devore* at para. 294.
[17] *Devore* at para. 303.

When Ms. Walker's physician, Dr. Chung, learned about the marriage from the niece, she made an urgent referral to the PGT stating her opinion that Ms. Walker was incapable of entering into a marriage relationship. Dr. Chung continued to be of the opinion, at the trial of this matter, that Ms. Walker was not capable of consenting to marriage and not capable to sign the 2009 Will.

After the marriage, Mr. Poulain and Ms. Walker consulted with another lawyer at the same office where her 2009 Will was executed. This second lawyer's file was produced at trial but the lawyer was not called as a witness. The file suggests that the lawyer was told Ms. Walker had had a stroke but was not advised of her Alzheimer's diagnosis. The file also indicated that the consultation was about obtaining greater access to Ms. Walker's bank account. The lawyer wrote a letter to her bank seeking information about Ms. Walker's account balance and why she was not permitted to access her account. Ms. Walker's niece (her attorney under the power of attorney for property) had put a $500 withdrawal limit on her account as all of Ms. Walker's bills were automatically deducted from her bank account. There was no need for Ms. Walker to obtain large sums of cash. Justice Griffin observed that this evidence pointed to "*concerted efforts by Mr. Poulain to try to get access to Ms. Walker's funds at Scotiabank post-Marriage: repeated contact with [the lawyer]; approaching the Scotiabank; and approaching another bank*".[18]

When the niece learned of the involvement of the second lawyer she informed the lawyer of her power of attorney and her suspicions of Mr. Poulain. Nevertheless, the lawyer "pressed on for a while" including preparing a new power of attorney appointing Mr. Poulain as Ms. Walker's attorney. The authenticity of this document was at issue since the niece claimed that she was with Ms. Walker until 4:00 p.m. on the date it was purportedly signed and she never mentioned an appointment with a lawyer. It wasn't until the PGT office communicated with the lawyer that he wrote a letter to Mr. Poulain concluding that he ought not to represent Mr. Poulain.

[18] *Devore* at para. 252.

The day after the new power of attorney was purportedly signed Ms. Walker had a fall in her condominium and was taken to the hospital. A note was found after Ms. Walker was in hospital in which Mr. Poulain had written "*will you please go over to the bank and withdraw $40,000. . . it is really really important"*.[19]

Mr. Poulain claimed that he had no knowledge of Ms. Walker's health condition and that he never observed anything out of the ordinary in her behaviour. He testified that even in September of 2010 when Ms. Walker was admitted to the hospital, she was fine, there was no change in her memory or other cognitive function from the time that he knew her.

The Court nevertheless found that the evidence showed a consistent campaign by Mr. Poulain to try to get access to Ms. Walker's funds post-marriage: "*I find it likely on the evidence that Mr. Poulain had long been fanning the fire of Ms. Walker's anxiety and paranoia by suggesting that the plaintiff was unfairly restricting her access to her own money, and that the intensity of these efforts increased after the Marriage*".[20]

Justice Griffin provided a thorough review of the evidence before her and ultimately concluded that Ms. Walker did not have the requisite decisional capacity to marry and as such the marriage to Mr. Poulain was *void ab initio*. Her Honour also found that, based on the evidence, Ms. Walker did not have capacity to execute a Will in 2009 or even in 2007, leaving the question of Ms. Walker's estate open for further inquiry.

Justice Griffin began her analysis by noting that the starting point is "the notion that a marriage is a contract. Similar to entering into any other type of contract, the contracting parties must possess the requisite legal capacity to enter the contract."[21] Referring to *Hart v. Cooper*, [1994] B.C.J. No. 159 (B.C.S.C.) at paragraph 30, Justice Griffin confirmed that "a person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the duties and responsibilities it creates."

[19] *Devore* at para. 253.
[20] *Devore* at para. 262.
[21] *Devore* at para. 43.

Relying on *Wolfman-Stotland*, which in turn referred to *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), aff'd (1998), 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 161 (S.C.C.), Justice Griffin observed that:

> the common law has developed a low threshold of capacity necessary for the formation of a marriage contract. The capacity to marry is a lower threshold than the capacity to manage one's own affairs, make a will, or instruct counsel. . .the capacity to marry requires the 'lowest level of understanding' in the hierarchy of legal capacities. . . The authorities suggest that the capacity to marry must involve some understanding of with whom a person wants to live and some understanding that it will have an effect on one's future in that it will be an exclusive mutually supportive relationship until death or divorce.[22]

Relying on the evidence presented at trial, Justice Griffin concluded:

> [343] As of the date of the marriage ceremony, Ms. Walker was at a stage of her illness where she was highly vulnerable to others. She had no insight or understanding that she was impaired, did not recognize her reliance on Ms. Devore-Thompson [the niece] and Ms. Devore-Thompson's assistance, and was not capable of weighing the implications of marriage to Mr. Poulain even at the emotional level.
>
> [344] The fact that Ms. Walker told some people that she had married Floyd Poulain does not overcome all of the evidence as to her disordered thinking. This does not mean she had any understanding of what it means to be married.
>
> [345] It is also clear that Ms. Walker's mental capacity had diminished to such an extent that by 2010 she could not have formed an intention to live with Mr. Poulain, or to form a lifetime bond. She did not understand, at that stage, what it meant to live together with another person, nor could she understand the concept of a lifetime bond.
>
> [346] Ms. Walker did not have a grip on the reality of her own existence and so could not grip the reality of a future lifetime with another person through marriage.
>
> [347] I find on the whole of the evidence, given her state of dementia, Ms. Walker could not know even the most basic meaning of marriage or understand any of its implications at the time of the Marriage including: who she was marrying in the sense of what kind of person he was; what their emotional

[22] *Devore* at para. 46-48.

> attachment was; where they would be living and whether he would be living with her; and fundamentally, how marriage would affect her life on a day to day basis and in future.
>
> [348] I conclude that Ms. Walker did not have the capacity to enter the Marriage.
>
> [349] Since I have concluded that Ms. Walker did not have the capacity to enter the Marriage, the Marriage is void *ab initio*. Because the Marriage is void *ab initio*, s. 15 of the *Wills Act* does not apply and, therefore, the Marriage does not revoke the prior wills.

The question of capacity with respect to marriage will, no doubt, often be more complicated than it was in this case as the niece's evidence was strong, with several credible witnesses. Nevertheless, this is a strong precedent for future claims to set aside predatory marriages for lack of capacity.

This case is also a reminder of the important role that lawyers play in protecting vulnerable older adults with diminished capacity, and in this instance, the evidence indicated the lawyers failed to follow best practices. The testimony regarding preparation of the 2009 Will and 2010 power of attorney suggested that no inquiries were made of the deceased's capacity. Instead, notations made by a party, with a vested interest in the changes to the Will, were accepted as instructions.

The second recent case where a marriage was set aside as void *ab initio* was *Hunt v. Worrod* 2017 ONSC 7397. While the victim in this case, Kevin Hunt, was not elderly, he was severely injured in an ATV accident and sustained a catastrophic brain injury. Before his accident, Mr. Hunt was involved with Ms. Worrod in an on-again and off-again relationship. Three days after Mr. Hunt returned home from the hospital he disappeared on the road outside his home. He did not have his medications. When his two adult sons tracked him down at a hotel (by obtaining particulars from his credit card) they learned that Ms. Worrod had made arrangements to marry Mr. Hunt and the wedding had already taken place. Police were called, and they released Mr. Hunt into the care of his sons. The sons brought an application, and one of the issues that the Court was required to consider was whether Mr. Hunt had the capacity to marry Ms. Worrod and if not, was the marriage *void ab initio*?

Justice Koke started the analysis by citing *Ross-Scott v. Potvin* 2014 BCSC 435:

> A person is capable off entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and duties and responsibilities it creates. The assessment of a person's capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs. Delusional thinking or reduced cognitive abilities alone may not destroy an individual's capacity to form an intention to marry as long as the person is capable of managing their own affairs.[23]

Justice Koke recognized the need to balance Mr. Hunt's autonomy and the possibility that he did not fully appreciate how marriage affected his legal status or contractual obligations. Justice Koke went on to conclude that a finding by a Court that an individual has capacity to marry, as set out in *Ross-Scott v. Potvin*, requires that that person "entering into a marriage contract understand the duties and responsibilities which a marriage creates *and* have the ability to manage themselves and their affairs" [emphasis in the original][24].

After reviewing extensive medical evidence, and evidence from the sons, Mr. Hunt, Ms. Worrod, and others, Justice Koke concluded that Mr. Hunt did not have the requisite capacity to marry and declared the marriage to be *void ab initio*.

COURT DECISIONS HIGHLIGHTING CIVIL REMEDIES

"Elderly Parents Duped into Immigrating to Canada, Savings Stolen": *Danilova v. Nikityuk*[25]

In this case a daughter, Svetlana, and her husband, Pavel, encouraged the daughter's mother and step-father to emigrate from Russia to Canada advising them that they would act as their sponsors and support them. The mother was 65 and had prior heath issues while in Russia. The step-father was 68, and also had health issues.

[23] *Ross-Scott v. Potvin*, 2014 BCSC 435 at para.177.
[24] *Hunt v. Worrod* 2017 ONSC 7397 at para. 83.
[25] 2017 ONSC 4016.

Prior to immigrating to Canada in 2008, the parents liquidated their Russian assets and forwarded the proceeds (approx. $260,000.00 USD) to the daughter and her husband in Canada, to support their sponsorship agreement. Pavel advised the parents that they would receive 10% interest off the money and “that a lot of retired people sell their paid-off houses, invest their money and live on the interest on the capital”. The step-father also brought $15,000 in cash to give to Pavel. Unbeknownst to the parents, Pavel, within days of receiving the funds, quickly lost all the parents’ money through improvident trading in the stock market.

When the parents came to Canada they moved into a house that had been purchased with a down payment with some of their money (the few funds not lost on the stock market) and they thought it was registered in their name and that they would live there alone. However, without prior notice to the parents, Pavel and Svetlana moved in to the house too, as they were under financial strain after Pavel lost all the money.

The parents’ money, their income from their Russian pensions, was then controlled, managed and overseen by the daughter. She took them to a Russian speaking lawyer where they executed general power of attorneys in her favour. The daughter then opened a bank account in their names with her as POA. This account received their Russian pensions. The daughter controlled all of the funds and the parents had to give her two days notice if they needed cash. Pavel also opened two TFSA accounts in their names.

Then in 2010, triggered by a tax audit for claiming the loss and “interest” on the “loan” of the money from the parents as a tax loss on his tax return, Pavel had the parents sign a “loan agreement” with Pavel as the “borrower” and Svetlana acted as a witness. The agreement stipulated that Pavel borrowed the $260,000 from the parents for “investment purposes” and that he would pay them interest. However, at the time this agreement was signed, the money had long been lost. The Court found that the parents "had no money to lend". Pavel and Svetlana took the position that the money was sent to him as an investment and he could do with it as he wanted. However, the Court found

that at no time did he discuss with the parents that he intended to invest their money in the stock market or that their money had been lost.

The controlling of their finances, a breakdown in the relationship, and an escalation to physical violence (shaking of the mother and throwing of dishes), prompted the parents to leave their home. The parents developed a "safety plan" and had been pre-approved for social housing. They left the house under claims of elder abuse which expedited their ability to access social housing.

Svetlana and Pavel then *sued the parents* (and other involved parties) for negligence, conspiracy, inducing breach of contract, defamation, and aggravated and punitive damages. The parents counterclaimed seeking damages for the loss of their savings, together with interest and punitive damages.

Justice Mulligan dismissed Svetlana and Pavel's claims against the parents and concluded that the parents were "*financially abused form the time they arrived in Canada*."[26] Justice Mulligan was also satisfied that there was a "*physical altercation as well. . .But even if I am wrong on that finding, it is clear that financial abuse and emotional abuse had already occurred*."

Regarding the parents' counter-claim, while Svetlana and Pavel argued the money was a gift, relying on *Pecore v. Pecore*, 2007 SCC 17, and the fact it was a transfer from a parent to an adult child, Justice Mulligan concluded that the doctrine of resulting trust applied and that it was "*plain and obvious that the funds transferred were not a gift*". Justice Mulligan also found that the parents were entitled to a constructive trust claim against the house as their money was used for a down payment and to furnish the house. The constructive trust was limited to the amount that the parents had contributed, as Svetlana and Pavel looked after the mortgage on the house.

Svetlana and Pavel were also found to have breached the sponsorship agreement entered into with the parents and breached a fiduciary duty owed, as Svetlana and

[26] 2017 ONSC 4016 at para. 170.

Pavel "*assumed the role of fiduciary*" to the parents. Further, Justice Mulligan found that the parents had made out a claim against Svetlana and Pavel for civil fraud. Svetlana and Pavel knowingly or recklessly made a false representation to the parents that they would receive 10% interest on their funds, the representation caused the parents to act (immigrate to Canada), and Pavel's actions resulted in a loss to the parents.

Ultimately the parents were awarded $277,000.00 in damages, $25,000.00 in punitive damages, $97,321 in interest at 10% on the capital, and interest on the judgment.

This case highlights the vulnerability of new Canadians who cannot speak the language and may be unfamiliar with Canadian culture or society. They can be easily isolated and taken advantage of by opportunistic relatives. Of note in this case, the sponsorship agreement form signed by the parties and provided by Citizenship and Immigration Canada included a cautionary note to the parents: "*Sponsored persons and/or their family members who are being abused or assaulted by their sponsors should seek safety away from their sponsors even if this means that they will have to apply for social assistance benefits*." The fact that this included on a standard form by the Canadian government suggests abuse of new Canadians is not an uncommon occurrence.

"Go-Karts for Mother": *McMaster v. McMaster*[27]

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.

[27] *McMaster v. McMaster* 2013 ONSC 1115

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": *Mroz v. Mroz* [28]

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.

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.

[28] *Mroz v. Mroz* 2015 ONCA 171

"The Son Who Tried to Steal His Mom's House": *Servello v. Servello*[29]

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.

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."

[29] *Servello v. Servello* 2014 ONSC 5035, upheld 2015 ONCA 434.

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": *Zimmerman v. McMichael Estate*[30]

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.

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.

[30] *Zimmerman v. McMichael Estate* 2010 ONSC 2947

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.

PROVINCIAL/TERRITORIAL LEGISLATION

Apart from the remedies found under the *Criminal Code*[31] (discussed below), 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; and
- Public Guardian and Trustee Legislation

[31] RSC 1985, c.C-46

Very few Canadian jurisdictions have adult protection laws that apply to adults who meet a definition of an "adult in need of protection". Those that do include: British Columbia,[32] Yukon,[33] Prince Edward Island,[34] and New Brunswick.[35] 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*.[36] 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,[37] Alberta,[38] Manitoba,[39] Ontario[40] and Nova Scotia[41] 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 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,[42] BC,[43] Alberta,[44] Saskatchewan,[45] Ontario[46] and Quebec[47] 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, rather simply laws to protect

[32] *Adult Guardianship Act*, RSBC 1996, c. 6
[33] *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A.
[34] *Adult Protection Act*, RSPEI 1988, c A-5
[35] *Family Services Ac*t, SNB 1908,c F-2.2
[36] *Adult Protection Act*, RSNS 1989, c.2
[37] *Community Care and Assisted Living Residential Care Regulation*, BC Reg 96/2009 Sched. D
[38] *Protection for Persons in Care Act*, SA, 2009 C.P-29.1
[39] *The Protection for Persons in Care Act*, CCSM, c P144
[40] *Long-Term Care Homes Act,* SO 2007, c8
[41] *Protection for Persons in Care Act*, SNS 2004 c 33
[42] *Public Guardian and Trustee Act*, SY 2003, c 21 Sch C, Part2 s.9(1)
[43] *Public Guardian and Trustee Act*, RSBC 1996, c 383 s.17
[44] *The Adult Guardianship and Trusteeship Act*, SA 2008, cA-4.2 ss75-77
[45] *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 s40.7
[46] *Substitute Decisions Act*, SO 1992, c 30, s27.
[47] *Pubic Curator Act*, RSQ, c C-81

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

CRIMINAL REMEDIES

The Canadian *Criminal Code*[48] 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 of "financial abuse" there are however certain offences under which such a perpetrator could be charged, including under:

- **Section 215: Failing to provide the necessaries of life (criminal neglect)**
- **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**
- **Section 366: Forgery**

[48] RSC 1985, c. C-46

- **Section 386-388: Fraud**

- **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*[49] 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 etc.

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

This case[50] is interesting because although section 331 was enacted as long ago as 1984, this is one of only a few reported decisions 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*".

[49] SC 2015 c 13 s 2
[50] 2011 ONCJ 851

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*."[51] 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.[52]

[51] *R v. Kaziuk* 2013 ONCA 217
[52] *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.[53] Ms. Dokaupe, 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. Dokaupe executed a power of attorney for property in her favour. Ms. Dokaupe 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. Dokaupe'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. Dokaupe's employment, and when Ms. Dokaupe's new caregiver read Ms. Dokaupe's bank statements, she told Ms. Dokaupe what she saw and called the police. The police charged the caregiver with fraud and obtained expert reports confirming that Ms. Dokaupe was capable of managing her property throughout the period in question, and during her discussions with police. Unfortunately, Ms. Dokaupe died before the trial took place. In her absence, the Crown relied on Ms. Dokaupe's witness statements which had been recorded by the police. The judge accepted Mrs. Dokaupe'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. Dokaupe'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*

[53] *R. v. Taylor*, 2012 ONCA 809

> *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. 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.[54]

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.

[54] Laura Tamblyn 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

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.

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 necessaries 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 necessaries 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. Bernard* – 2015 - Surrey, BC – Section 380 (1) (a) (Fraud over $5000)**

Joseph Bernard[55] 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 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.

[55] 2015 BCPC 107.

> 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".[56] The fraudster was sentenced to **4 years** in custody.[57]

***R. v. Hooyer* – 2016 - 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 couples 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

[56] 2015 BCPC 107 at para. 65.
[57] 2015 BCPC 107 at para. 66.

$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.[58]

***R. v. Curreri* – 2016-2017 - Toronto, Ontario – S.380 (1)(a) – Fraud over $5,000[59]**

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 the son and the legal assistant were found guilty in June 2016 and both were sentenced to

[58] *R. v. Hooyer* 2016 ONCA 44.
[59] *R. v. Curreri* 2016 ONSC 3598, 2017 ONSC 3701 (application for a mistrial dismissed), and 2017 ONSC 5652 (sentencing).

two years less a day to be served conditionally in the community, including a 10 month house arrest, and a payment of a fine *in lieu* of forfeiture, a no-contact order, and the provision of a DNA sample. 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.[60]

***R. v. Reynolds* – 2016 - Victoria, British Columbia – Section 322 (Theft)**

A daughter stole over $300,000 from her elderly mother's bank account from 2009-2013.[61] 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* – 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. [62] 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.)

[60] *R v. Curreri*, 2016 ONSC 3598 at paras. 43-44
[61] *R. v. Reynolds* 2016 BCPC 69
[62] *R.v. Bruyns* 2016 ONCJ 207

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 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.[63]

***R. v. Gliddon* – 2017 – Alberta – section 380(1) fraud over $5000**

In this case Mr. Gliddon defrauded three separate individuals by receiving from them thousands of dollars in return for renovation work he deceitfully promised to do, but never performed, in relation to their respective residences. In the sentencing decision the court examined the vulnerability of the victims as one of the aggravating factors. The victims were aged 84-87. Justice Fradsham concluded that there was no question that one of the victims was vulnerable, however questioned whether to find the other two victims to be:

> vulnerable [so as to constitute an aggravating factor, bearing in mind that aggravating factors must be proven beyond a reasonable doubt: section 724(3)(e)] solely on the basis that they were "elderly"? I am aware that in ***R. v. Rockett*** (2009)2009 PECA 7 (CanLII), 283 Nfld. & P.E.I.R. 247 (P.E.I C.A.), Justice Murphy, speaking for the Court, said, at paragraph 18, in a case similar to the one at bar, "The reality of the situation is that the respondent deliberately planned to prey on and victimize the most vulnerable in our society, the elderly." With respect, I am reluctant to presume, solely on the basis that a person is "elderly", that the person is "vulnerable". I can understand a conclusion that children, as a class and without more, are vulnerable, but I cannot reach the same conclusion in relation to the elderly. To do so would seem to me to be engaging in stereotyping. I agree that the elderly, as a class, are more prone to being vulnerable, but I am of the view that some evidence of vulnerability (other than age alone) is necessary before a court can find that, as an aggravating factor in a sentencing, an elderly victim was "vulnerable". I do not have that evidence before me in relation to either Ms. Sholte or Mr. Allen.
>
> However, the discussion should not end there. While it would be wrong for the Court to stereotype all elderly people as vulnerable, it is clear from the facts that Mr. Gliddon was making his own assumptions that elderly people would be more vulnerable to his fraudulent activities. His intent to prey upon persons he perceived as vulnerable should not be overlooked simply because his perception may have been faulty. **His intent to prey on those he assumed would be vulnerable is a properly considered aggravating factor**.[64] [emphasis added]

[63] 2016 ONCJ 527
[64] *R. v. Gliddon*, 2017 ABPC 38 at paras. 23-24.

Mr. Gliddon was sentenced to 730 days incarceration, giving him credit for 324 days of pre-sentence custody, leaving him with 406 days left to serve.

CONCLUDING COMMENTS

As elder abuse continues to exist and extend its societal impact, 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 remedial routes exist to address elder 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.

RESOURCES

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

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

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 Abuse: 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

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