



CIVIL, CRIMINAL, & EQUITABLE REMEDIES

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Elder Abuse and Manners of Protecting the Elderly

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INTRODUCTION

When abuse of older adults is suspected, legal remedies can be sought under both provincial and federal laws, including the *Criminal Code*¹ of Canada, and civil proceedings seeking common law and equitable remedies. Civil and criminal proceedings can be commenced simultaneously or civil remedies can be pursued alone as a means of recovering property, seeking restitution, and obtaining damages. The lawyer's toolbox in seeking out remedies for clients is broad, but some remedies may be easier to obtain than others. Similarly some may be more affordable than others.

ELDER ABUSE: OVERVIEW

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

According to the Canadian Department of Justice, financial abuse is the most commonly reported type of abuse against older adults.² However, the Department of Justice also commented on the difficulty in estimating the prevalence and incidence of elder abuse in Canada due to obvious factors associated with under-reporting.³ Financial abuse can include improper use of joint bank accounts, forgery or abuse involving a Power of Attorney document ("POA"), 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 others.⁴ Financial abuse is too often conducted by a family member upon whom the older adult is dependent and who is potentially influenced by or controlled and victimized.⁵ Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust (where there is a power

¹ RSC 1985 c C-46 ("*Criminal Code*")

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

³ *Ibid.*

⁴ Government of Canada, Seniors Canada, *Facts on Financial Abuse of Seniors*, online: <http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=158> .

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

imbalance).⁶ Financial abuse often occurs in connection with other types of abuse. For example, an attorney under a POA may refuse to provide an older adult with funds to pay for groceries or other necessities of life.

According to the World Health Organization, “elder abuse” is: “A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.”⁷

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

Elder abuse can involve:

- misusing a Continuing Power of Attorney for Property (“CPOAP”) which is a legal document where a person gives another the legal authority to make financial decisions on the grantor’s behalf;
- stealing an older adult’s money, pension cheques, or possessions;
- committing fraud, forgery or extortion;
- 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 understood
 - Gift money to relatives, caregivers or friends
 - Engage in paid work to bring in extra money,⁸
- An adult child who threatens an older adult that they cannot see their grandchildren unless they guarantee a loan or give them money (psychological abuse),

⁶ Government of Canada, Seniors Canada, *Facts on the Abuse of Seniors*, online <http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=155>

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

⁸ 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>

- Failure to provide necessities of life under a POA (shelter, food, medication, assistive devices),
- Isolating the older adult to gain control;
- Domestic violence, physical or sexual abuse, and
- Predatory marriage: where unscrupulous individuals prey upon older adults with diminished reasoning ability purely for financial gain.

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;
- being coerced into a situation of overwork and underpay;
- unexplained disappearance of possessions (lost jewellery or silverware);
- changes in POA documents;
- being overcharged for services or products by providers; and
- being denied the right to make independent financial decisions.⁹

The most frequent perpetrators of abuse on older adults are adult children, service providers, strangers, or even spouses especially in the predatory marriage context.

Often adult children who harm their parents have their own health concerns which may include mental health issues, substance abuse, social isolation, unemployment issues and may be financially dependent on the older person.¹⁰ 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 they are a family member;
- feels that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is family or is a friend;
- feels guilty for becoming a victim, or feels blameworthy;
- can minimize, rationalize or deny the abuse altogether;
- may not even recognize the abuse;
- may not be able to report even if an existent desire to;
- may not have the physical ability to report;
- may be suffering from dementia or lack of requisite mental capacity;
- worried about stigma on the family; or

⁹ 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>

¹⁰ Laura Tamblin Watts, "Background Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts" Canadian Centre for Elder Law, March 2013

- resistant to having strangers in the home to provide services that the abuser does.

THE AVAILABLE REMEDIES: CIVIL, EQUITABLE, & CRIMINAL

While criminal prosecution is a possibility in the context of abuse, it is not always an ideal response for a variety of reasons: prosecutions are often difficult as 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; 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, etc.

Also, 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 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.

Nevertheless, there are still many barriers to achieve justice for victims in our civil system as well. 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.

Further, there are several under-utilized equitable remedies, especially in situations where the abuse of the older adult is through a predatory marriage. We will discuss these potential equitable remedies and how they can be applied to right the wrongs committed against one of the most vulnerable population in our society.

There are also a number of federal and provincial/territorial laws that may apply to abuse of seniors. Federally, besides the *Criminal Code*, privacy legislation will also come 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 & EQUITABLE REMEDIES

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 POA for Property, or under a CPOAP must fulfill certain ethical, moral and legal duties. Often abuse results from that attorney's actions and failure to meet their fiduciary duties which are governed legislatively by the *Substitute Decisions Act, 1992*¹¹ and by common law.
2. **An "inadvertent" transfer of assets:** This involves either money, or real property or transfer of property rights or beneficial rights, by a vulnerable adult to another person. This can happen through transferring property

¹¹ SO 1992 c 30 ("SDA").

into joint names where the transferor is pressured into the transaction or does not understand the ownership or survivorship rights. Or there is 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.

Below is a summary of some of the most common remedies in civil litigation for elder financial abuse including both common-law and equitable remedies:

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

A 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 *SDA* particularizes the obligations and duties of an attorney under a power of attorney for property. The *SDA* includes 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.

In terms of the removal of an attorney for property, the case law establishes that “there must be strong and compelling evidence of misconduct or neglect on the part of the attorney” before the Court should ignore the wishes of the donor who gave the Attorney his or her power: see *In the Matter of the Estate of Johanna Maria Schaefers, Incapable, Teffer et al. v. Schaefers et al* (2008), 2008 CanLII 46929 (ON SC) 93 O.R. (3d) 447 at para. 24. The Court will also look to the question of whether the attorneys are managing the affairs of the donor properly.

In the rather sad case of ***McMaster v. McMaster***,¹² a mother appointed her two sons as joint attorneys under a CPOAP. However, she decided not to tell one of her attorneys that he was appointed (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. For example, he thought it would be a good idea to invest his elderly mother’s hard earned money into a go-kart business. By the time the other son figured it out, the mother’s assets were depleted by almost \$2 million.

The Court removed the son as the attorney and ordered that he provide an accounting for the money (see remedy #2 below). The Court also had this to say: “*Mary [the mother] 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.

¹² 2013 ONSC 1115.

2. Order to Account: Passing of Accounts

Another civil remedy to address money wrongfully taken by an attorney under a CPOAP is to obtain an order that an “accounting” be provided by the attorney tracking all transactions undertaken on behalf of the grantor.¹³

At the hearing of an accounting application under the *SDA*, the civil court will consider the evidence and look at the accounts and the conduct of the attorney. Judges have broad discretion in an accounting application – they can make all manner of inquiry into the conduct of the attorney. If it is found that the attorney failed to meet the obligations under the *SDA*, it is open to the court to make a finding that there has been a breach of fiduciary duty.

In the case of *Zimmerman v. McMichael Estate*¹⁴ 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 have her 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.

¹³ For more information on passing of accounts applications, see WEL Partners book on Fiduciary Accounting: <http://welpartners.com/resources/WEL-on-Fiduciary-Accounting-2nd-Edition-Fall-2016.pdf>

¹⁴ *Zimmerman v. McMichael Estate* 2010 ONSC 2947.

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

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

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

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

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

In *Testa v. Testa*,¹⁵ Tony, a son of an older woman who suffered from Alzheimer's was her attorney under a CPOAP. Tony transferred titled of his mother's house to one of his four brothers (who was to hold it "in trust" for his mother) who then took a mortgage out on the property. These two brothers were living at the house rent free. The brothers then invested the proceeds of the mortgage into private mortgages to generate an income for their mother to assist with the mother's rent at a long term care facility.

Two of their other brothers brought an application seeking (among other things) for Tony to pass his accounts and alleged that he breached his fiduciary duty as attorney. Regarding the accounting, the Court found that Tony did not distinguish between his assets and his mother's assets and had no recollection of certain transactions, including

¹⁵ 2015 ONSC 2381.

one that exceeded \$150,000.00. Tony was ordered to pass his accounts as attorney under a CPOAP.

Further, with respect to the brother holding the home in trust for the mother, the Court held that Tony did have the authority to create the trust as it was effective immediately and not dependent on the death of his mother for its creation (it was an *inter vivos* trust and not a testamentary disposition). However the Court also found that he breached his fiduciary duty to his mother as the use of the trust was not sued in a way to materially benefit her and improve her situation.¹⁶ The brothers were ordered to reimburse certain amounts to their mother's estate.

3. Compensatory Damages / General Damages / Punitive Damages

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.

The Court can also award punitive damages where egregious conduct has occurred. In ***Walters v. Castell*** 2001 BCCA 112 an attorney depleted the grantor's bank account and was ordered to pay \$1,000.00 in punitive damages (among other damages). In ***Dhillon v. Dhillon*** 2005 BCSC 1903, \$20,000.00 in punitive damages was awarded when a wife and son forged POA documents and sold property owned by the husband and father when he was out of the country. And in ***Grewal v. Brar*** 2012 MBQB 214 \$30,000.00 in punitive damages was awarded where the attorney misled the grantors into executing POA documents and then he used them to obtain title to the grantors' lands.

¹⁶ *Testa v. Testa* 2015 ONSC 2381 at para.93.

4. Rescission

Rescission is an equitable remedy granted to a plaintiff in the case of fraud, misrepresentation, or because of some other action on the defendant's behalf (such as undue influence, unconscionability) that makes the contract entered into inequitable. Rescission in equity operates to put the parties to the contract into the position the parties were in prior to contracting: rescission *ab initio*. Rescission should be available to rescind a transaction or contract in a financial abuse situation. Further, it should be available to rescind the marriage contract in a predatory marriage scenario and put the parties back into the position they were in prior to the predatory marriage.

5. Setting 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 automatically transfers to the adult child once they have passed away.

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, as "that's what Mother wanted". The other children cry foul and say "No, Mother wanted the money to be split between ALL of the children". That's where the lawyers come in. A civil 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.

In ***Mroz v. Mroz***¹⁷ an adult daughter convinced her widowed mother to transfer the title of her house (her only significant asset) into joint ownership with her. 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.

In ***Servello v. Servello***,¹⁸ 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 registry office 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 again, but this time with one of her daughters and had a title search completed on her house. This was the first time

¹⁷ 2015 ONCA 171.

¹⁸ 2014 ONSC 5053 aff'd 2015 ONCA 434.

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.”

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.

While the main action in *Rikhye v. Rikhye*¹⁹ was the setting aside of a transfer of property from an older adult mother to her son and daughter-in-law on allegations of elder abuse, this particular decision also dealt with a motion to address who may attend cross-examinations in such proceedings. A daughter of the older adult mother (who the older adult now lives with) wanted to be allowed to attend her mother's cross-examination in these proceedings as a “moral support person”. The son and daughter-in-law opposed her attendance as it was the daughter who had called the police and accused the son of elder abuse (which the son denied).

¹⁹ 2017 ONSC 4772.

The mother took medication for depression and anxiety and according to another son “is very loving and trusting of her caregivers. . .[and] will go to extreme lengths to avoid upsetting . . .her caregiver”, who is now the daughter.

The Court examined the following principles emerging from case law on who can attend cross-examinations: 1) as it is not a public hearing, a non-party may attend to assist a party only on the consent of the other side or on the order of the court; 2) the onus is on the party seeking such an order to prove entitlement to it; 3) the non-party should not be a witness at the subsequent trial; 4) the attendance of the non-party must not disrupt the examination process; and 5) the non-party must not take the role of witness or assist the witness in answering questions. Also, the Court in exercising its jurisdiction must do so having regard to both substantive fairness to the parties and the appearance of fairness.

The son and daughter-in-law claimed the mother was being manipulated by the daughter and the daughter claimed the mother was too afraid of the son to be at the cross-examination alone. Bloom J., concluded that the daughter could not attend the cross-examination, stating:

. . . having regard to the principles. . . I find that the Plaintiff [mother] has not discharged her onus to obtain the order for [the daughter’s] attendance. To the contrary, the Defendants could not have confidence in the fairness of the cross-examination, if they saw [the daughter] who attended with the Plaintiff when she secured the arrest of [the son]. Further, I believe that the timing of the commencement of the action, being soon after the Plaintiff went to live with [the daughter] creates both a danger of substantive unfairness and the appearance of unfairness if [the daughter] is present for the cross-examination. I am mindful of the evidence of [the other son] that the Plaintiff wishes to please her caregiver. **I am, accordingly, concerned that she may feel pressure, or be reasonably seen to feel pressure, to make her evidence more unfavourable to the Defendants than it would otherwise have been, in an effort to please [the daughter].** I make that observation, because it is with [the daughter] that she lives, and with whom she lived when the action was commenced and when she attended at the police station.²⁰

²⁰ 2017 ONSC 4722 at paras. 13-14.

6. Setting Aside Predatory Marriage: Lack of Requisite Capacity

Another form of financial abuse includes circumstances where an older adult inadvertently transfers property or beneficial rights through a predatory marriage. As noted above, a predatory marriage occurs where unscrupulous opportunists prey upon in particular, older adults with diminished reasoning ability purely for financial gain through the contract of marriage. This is particularly true as marriage brings with it a wide range of property and financial entitlements and 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 current factors to be applied in ascertaining the requisite “capacity to marry” are anything but rigorous – meaning that capacity is likely found by a court, even in the most obvious cases of exploitation. Consequently, predatory and exploitative marriages are more likely than not, likely to withstand a challenge. The reason predatory marriages are not easily challenged is because the centuries’ old understanding for “capacity to marry” as it has developed in our courts states literally that the contract to marry is a “simple one” and “one which does not require a high degree of intelligence to comprehend”. As such “capacity” is often found even in the most obvious cases of exploitation, notwithstanding challenge, despite the injustice to the incapable person and heirs.

Our case law has shown that the older adult will likely be considered capable of marriage²¹ 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.

²¹ See for example *Banton v. Banton* 1998 CanLII 14926 (ONSC), *Ross-Scott v. Potvin* 2014 BCSC 435.

However, in a recent case from British Columbia a court has set aside a “predatory” marriage for lack of requisite capacity to marry. This case suggests perhaps the common law is finally catching up with societal norms.

In ***Devore-Thompson v. Poulain***²² an older woman suffered from Alzheimer’s and other cognitive disorders but fiercely wanted to maintain her independence. She remained in her condominium as long as she could through the assistance of her loving niece who acted as her attorney under a continuing power of attorney for property. The aunt could not clean herself, remember how to cook, or even use a phone. As time passed the aunt grew very suspicious of the niece, despite the niece’s caring efforts. Eventually it was revealed that the aunt had married a younger man, unbeknownst to her family and friends. This man, the Court noted had started a “consistent campaign” to try to get access to the aunt’s money. He also told her that by “marrying him, [he] would help her get back her freedom, her freedom of choice” as he told the Aunt that she could not trust the niece and that the niece was stealing her money. The man also took the aunt to a lawyer to have her execute a new Will and power of attorney in his favour.

After the aunt’s death, the niece brought a claim seeking to set aside the marriage and the Will. Justice Griffin concluded after a thorough review of evidence from family, friends and expert medical evidence that the aunt did not have the requisite decisional capacity to marry and that her marriage was *void ab initio*:

[343] As of the date of the marriage ceremony, Ms. Walker [the aunt] 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 [the perpetrator] 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.

²² 2017 BCSC 1289

[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 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.

The Court also found that she lacked capacity to execute the Will.

Whether a person has capacity to marry is often complicated and may perhaps be more complex than in this particular set of facts since this case is one where there was consistent, strong, and compelling evidence from several credible witnesses. However, this is a good precedent for future claims where a party seeks to set aside a predatory marriage for want of the requisite decisional capacity to enter into the contract of marriage.

Nevertheless, the age old test attributed to the requisite decisional capacity to marry being described as a "simple test," simply no longer has any place in today's society where marriage is anything but simple. This is particularly so with the highly complex property rights that now attach to marriage and moreover, the existence of very complicated family units-the consequences of which are legally vast.

This case is also a reminder of the important role that lawyers play in protecting vulnerable older adults with diminished capacity, since in this instance the evidence indicated the lawyers perhaps failed to follow best practices. The testimony regarding the preparation of the Will, and the power of attorney suggested that no inquiries were

made of the deceased's capacity. Instead, notations made by a predator, with a vested interest in the changes to the Will, were accepted as instructions. This was neither probing, nor prudent.

There are many further developments that will assist in the remedy of the wrongs done by these unions including to mention but a few, in Ontario reforming the legislation making it such that marriage does not revoke a Will; by creative legislative reform which could prevent these marriages from taking place; by introducing legislated caveats to prevent the issuance of a marriage license and the solemnization of marriage in cases where capacity is lacking, which BC enjoys; and by making marriage commissioners more accountable. These marriages perpetrated under false pretenses rob our elderly of their dignity and their intended heirs of the gifts of their loved ones.

7. Undue Influence

The equitable doctrine of undue influence is often relied on to set aside a will or *inter vivos* gifts that were procured by undue influence and can be used in the financial elder abuse context. Recent cases have explored situations where older adults have been victimized by undue influence.²³ Courts will set aside certain transactions where an individual exerts such influence on the grantor or donor that it cannot be said that his/her decisions are wholly independent.

The writer proposes that the same doctrine, if proven, may be used to set aside a predatory marriage. While the older adult may not be giving actual gifts to the predatory spouse, the consequence of the marriage effectively results in a gift to the predator. In *Ross-Scott v. Potvin*,²⁴ discussed above, the only surviving relatives of the deceased, Mr. Groves, sought to have his marriage annulled on grounds of undue influence and lack of capacity. Justice Armstrong applied the common law factors for determining requisite capacity to marry and ultimately dismissed all of the claims, despite compelling

²³ See for example *Gironda v. Gironda*, 2013 ONSC 4133, additional reasons 2013 ONSC 6474 and *Servello v. Servello* 2014 ONSC 5035, upheld 2015 ONCA 434.

²⁴ 2014 BCSC 435

medical evidence of diminished capacity and vulnerability. With respect to undue influence, Justice Armstrong had this to say:

I have concluded that the burden of proof regarding a challenge to a marriage based on a claim of undue influence is the same as the burden of proving a lack of capacity. The plaintiffs must provide the defendant's actual influence deprived Mr. Groves of the free will to marry or refuse to marry Ms. Potvin. The plaintiffs have failed to meet the burden of proving that Mr. Groves was not able to assert his own will.²⁵

While the evidence was not sufficient for the Court to find undue influence in this situation, if proven, the undue influence doctrine should be available to set aside a predatory marriage.

8. Unconscionability

Another tool to fight or remedy elder financial abuse is the doctrine of unconscionability. This doctrine will typically be used to set aside a contract or transaction that offends the conscience of a court of equity. However, unconscionability is not restricted to the law of contracts. And, while it is closely related to undue influence, they are separate and distinct. A claim of undue influence attacks the sufficiency of *consent*. Unconscionability arises where an unfair advantage is gained by an *unconscientious use of power* by a stronger party against a weaker. In order to be successful such a claim would need proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him or her in the power of the stronger party and proof of substantial unfairness of the bargain obtained by the stronger. This creates a presumption of fraud which the stronger party must rebut by proving that the bargain was fair, just and reasonable.²⁶

Equity protects the vulnerable older adult from unconscionable bargain. A gift or other voluntary wealth transfer is *prima facie* unconscionable where:

²⁵ *Ibid.*, at para 240.

²⁶ *Morrison v. Coast Financial Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), at p. 713. See also the case of *Smith v. Croft* 2015 CanLII 3837 (ONSCSM) where the Ontario Small Claims Court set aside a transaction as unconscionable where a neighbour purchased an antique truck valued at \$18,000 from an elderly neighbour with dementia for \$2000.00.

- 1) The maker suffers from a disadvantage or disability, such as limited capacity, lack of experience, poor language skills, or any other vulnerability that renders the maker unable to enter the transaction while effectively protecting the maker's own interests; and
- 2) The transaction affects a substantial unfairness or disadvantage on the maker.²⁷

There will be a presumption of an unconscionable transaction if these two elements exist. However the court will look at all of the evidence to determine whether the transaction is fair, just and reasonable.²⁸

The onus is on the person attacking the gift or other wealth transfer to prove that the transaction was unconscionable. If the transfer or gift is found to be unconscionable the transaction is voidable and can be set aside.²⁹

Further, arguably, a predatory marriage can be characterized as unconscionable where one party takes advantage of a vulnerable party, on the grounds there is an inequality of bargaining power and accordingly it would be an improvident bargain that the predator would be entitled to all of the spousal property and financial benefits that come with marriage.³⁰

9. *Non Est Factum*

Non Est Factum is the plea that a deed or other formal document is declared void for want of intention and has been used to set aside contracts where a party signs a document with a fundamental misunderstanding as to the nature or effect of the document.

²⁷ John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p.438 (“Poyser”) at p. 559; *Morrison v. Coast Finance Ltd.* 1965 CarswellBC 140 (C.A.).

²⁸ Poyser at p. 559.

²⁹ Poyser at p. 559.

³⁰ See *Juzumas v. Baron* 2012 ONSC 7220, *Morrison v Coast Finance Ltd.*, 1965 CarswellBC 140 (S.C.J.)

Non Est Factum was proven in the case of *Servello v. Servello*, 2014 ONSC 5035, aff'd 2015 ONCA 434, where the mother thought she was signing power of attorney documents, when really she was signing a transfer of the title to her property into her son's name. The court found that *non est factum* applied and the transfer of an interest in the property to her son was void:

Whatever it was that [the mother] thought she was signing at the time, I am confident that she did not believe that she was signing a document that transferred her entire property, including the home property, to Antonio. She had made it clear throughout her life that she intended to treat her children equally upon death, and there was no reason for her to transfer the entire home property to one of her eight children.³¹

Non Est Factum is defence developed in common law and not the court of equity. However, it could be applicable to a predatory marriage situation where the predatory attempts to enforce some right arising from the marriage and the victim entered into the marriage with a fundamental misunderstanding as to the nature or effect of executing the marriage document.

10. Using a Statute as an Instrument of Fraud

The principle that one may not use a statute as an instrument of fraud should also be available as a tool to combat the unfair consequences of elder financial abuse and especially in predatory marriages. In the context of trusts of land the *Statute of Frauds*³² provides that a declaration or trust of land is void unless it is proved by writing, signed by the maker. If it is not in writing and the beneficiary seeks to have it enforced, the transferee may claim to hold title absolutely and defend the proceedings by relying on the Statute. However, equity will not allow the Statute to be used as an instrument of fraud and the court will direct that the property is held in trust for the beneficiary. A marriage is also based on, and sanctioned by, legislation.³³ The predator relies on the

³¹ 2014 ONSC 5035, aff'd 2015 ONCA 434 at para. 44.

³² (1677), 29 Car.2.c.3, s.7. and see RSNB 1973, c.S-14, s.9; RSNS 1989, c 442,s5; RSO 1990, c.S.19, s.9.

³³ See, e.g., *Marriage Act*, R.S.A. 2000, c. M-5; R.S.B.C 1996, c. 282; C.C.S.M., c. M50; S.N.L. 2009, c, M-1.02; R.S.N.B. 2011, c. 188; R.S.N.W.T. 1988, e. M-4; R.S.N.W.T. (Nu.) 1988, c. M-4; R.S.O. 1990, c. M.3; R.S.P.E.I., 1988, c. M-3; R.S.Y. 2002, c. 146; *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436.

statutes to enforce his or her claim. However a predator spouse's claim is fraudulent because the predator persuaded his or her spouse by devious means to enter into the marriage. A court of equity should not allow the statute to be used in this way, and should restore the property the predator received to the rightful heirs.

11. No One Shall Profit from His or Her Own Wrongdoing

Yet another tool that could reasonably be applied in attacking financial elder abuse or the injustice of predatory marriages is challenging the perpetrator's right to inherit from the older adult's estate either under a will or under legislation.

Seeking a declaration that the predator or abuser is barred or estopped from inheriting is a remedy based in public policy, where the law will not permit same. "No one shall profit from his or her own wrongdoing" is a principle that is applied in cases in which a beneficiary, who is otherwise sane, intentionally kills the person from whom the beneficiary stands to inherit under the deceased's will, on the deceased's intestacy, or otherwise. Canadian courts have found that the property does not pass to the beneficiary, but equity imposes a constructive trust on the property in favour of the other persons who would have received the property.³⁴ It is also clear that a beneficiary will not inherit where the beneficiary perpetrated a fraud on the testator and as such obtained a legacy by virtue of that fraud,³⁵ or where a testator was coerced by the beneficiary into a bequest.³⁶ The comparable common law principle is *ex turpi causa non oritur actio*, ie. a disgraceful matter cannot be the basis of an action, discussed below.

In New York, two decisions provided a compelling analysis of these concepts and their applicability to predatory marriages which was relied upon. The facts in *In the Matter of Berk*,³⁷ and *Campbell v. Thomas*,³⁸ are quite similar. In both cases a caretaker used her position of power and trust to secretly marry an older adult where capacity was an

³⁴ *Lundy v. Lundy* 1895 24 SCR 650.

³⁵ *Kenell v. Abbott* 31 E.R. 416]

³⁶ *Hall v. Hall* (1868) L.R. 1 P.& D. 48]

³⁷ *In the Matter of Berk*, 71 A.D. 3d 710, NY: Appellate Div., 2nd Dept., 2010.

issue. After death, the predator spouse sought to collect her statutory share of the estate (under New York legislation surviving spouses are entitled to 1/3 of the estate or \$50,000, whichever is more). The children of the deceased argued that the marriage was “null and void” as their father lacked capacity to marry. The court at first instance held that even if the deceased was incapable, under New York estate legislation the marriage was only void from the date of the court declaration and as such, not void *ab initio*. The predatory spouse maintained her statutory right to a share of the estate.

In both appeal decisions (released concurrently) the court relied on a “fundamental equitable principle” in denying the predator’s claims: “no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.” This principle, often referred to as the “Slayer’s Rule”, was first applied in New York in *Riggs v. Palmer*,³⁹ to stop a murderer from recovering under the Will of the person he murdered. Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that might otherwise flow from his wrongdoing. New York courts have also used this rule to deny a murderer the right to succeed in any survivorship interest in his victim’s estate.

The court recognized that while the actions of the predatory spouses were not as “extreme” as those of a murderer, the required causal link between the wrongdoing and the benefits sought was, however, even more direct. A murdering beneficiary is already in a position to benefit from his victim’s estate when he commits the wrongdoing, but it was the wrongdoing itself (the predatory marriage) that put the spouse in a position to obtain benefits. The court held that the predator spouse should not be permitted to benefit from this wrongful conduct any more than should a person who coerces their way into becoming a beneficiary in a Will.⁴⁰

³⁸ *Campbell v. Thomas*, 897 NYS2d 460 (2010)

³⁹ *Riggs v. Palmer*, 115 N.Y. 505,511 [1889]

⁴⁰ Note that the dispute in *Matter of Berk* is still ongoing with the most recent decision determining the standard and burden when relying on the equitable doctrine that one should not profit from her wrongdoing: the children of the deceased bear the burden of proving wrongdoing by a preponderance of evidence: See *Matter of Berk*, 133 AD 3d 850 (2015) and 2016 NY Slip Op 76663(U).

Arguably, such an approach ought to be available in Canada to defend/attack against these predatory entitlements and this principle should also be used to invalidate a predatory marriage.

12. *Ex Turpi Causa Non Oritur Actio*

The legal principle, *ex turpi causa* acts as a defence to bar a plaintiff's claim where the plaintiff seeks to profit from acts that are "anti-social"⁴¹ or "illegal, wrongful or of culpable immorality"⁴² in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing.

Arguably a Court should not assist a financial abuser or a predatory spouse in recovering the benefits from a marriage which was obtained through the predator's devious, unscrupulous and anti-social means. The unscrupulous, should not be entitled to financial gain arising from the "anti-social" or "immoral" act of a predatory marriage. A predatory spouse alters an older adult's life and testamentary plan by claiming entitlements in the same manner as if he/she coerced the testator to add his/her name to a Will.

13. Restitution through Unjust Enrichment & Constructive or Resulting Trust

The principle of unjust enrichment is well developed in Canadian law and largely developed in the context of co-habitational property disputes. To be successful in unjust enrichment, one must satisfy a three-part test, demonstrating:

1. the defendant was enriched;
2. the plaintiff suffered a corresponding deprivation; and

⁴¹ *Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742.

⁴² *Hall v. Hebert* 1993 2 S.C.R. 159.

3. the enrichment was not attributable to established categories of juristic reason, such as contract, donative intent, disposition of law, or other legal, equitable or statutory obligation.⁴³

Remedies for unjust enrichment include the finding of a constructive trust, resulting trust or a monetary award. If the claimant cannot demonstrate that a trust is appropriate then a monetary order is usually awarded instead.

In the New York case of *Campbell*, discussed above, the Appellate Division noted also that because the predatory spouse altered the older adult's testamentary plan in her favour, equity will intervene to prevent the unjust enrichment of the wrongdoer predator spouse.⁴⁴ The principle of unjust enrichment should also be used to invalidate a predatory marriage in Canada and restore the property to the rightful heirs. The existence of the marriage should not be considered to be a juristic reason to deny relief, since the marriage was motivated by the wrongful desire to obtain control of the older adult's property.

Further, an abuser has been unjustly enriched in situations where an older adult has given a benefit 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 financial abuser has been unjustly enriched then the Court can order that money be paid to the older adult or find that the property the abuser has is being held in trust for the older adult.

14. Common Law Fraud / Tort of Deceit

An approach based in fraud, either common law fraud or equitable/constructive fraud is also worthy of consideration in combating elder financial abuse. The elements for common law fraud (also called the tort of deceit) are as follows:

⁴³ See *Becker v. Petkus* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834 (SCC); *Garland v. Consumers' Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.).

⁴⁴ *Campbell* at p.119.

- 1) A false representation made by the defendant;
- 2) Some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
- 3) The false representation caused the plaintiff to act (inducement); and
- 4) The plaintiff's actions resulted in a loss.⁴⁵

Arguably, based on the elements above, if an older adult was induced into making an *inter vivos* gift or to transfer property into joint names, based on a knowingly false statement, and the donor suffered damages, the gift or transfer could be set aside on the ground of common law fraud.

This could also be applicable to predatory marriages. In the usual predatory marriage situation, the predator spouse induces the older adult to marry by perpetrating a false representation that the marriage will be a “real” marriage (which the predator spouse knows is false, is a trick, is a misrepresentation) and the older adult relies on the representation and marries the predator spouse suffering damage as a result (either through money gifted to the predator spouse, or through the various rights that spouse takes under legislation, which deprives the older adult of significant property rights. A case could be fashioned such that the predator's behavior meets the required elements to qualify and succeed in an action of civil fraud as a result of the following

Canadian Courts are rich with decisions analyzing civil fraud/tort of deceit in the context of marriage in “immigration fraud” cases where one spouse falsely represents he/she is entering into a “true” marriage when in fact the marriage was entered into simply to attain Canadian residency.⁴⁶ The Courts have been reluctant to set aside this type of marriage as a fraud.

⁴⁵ *Bruno v. Hryniak* 2014 SCC 8 at para. 21.

⁴⁶ See for example *Torfehnejad v. Salimi* 2006 CanLII 38882 (ONSC) upheld 2008 ONCA 583; *Grewal v. Kaur* 2011 ONSC 1812; *Raju v. Kumar* 2006 BCSC 439; and *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)

In *Ianstis v. Papatheodorou*,⁴⁷ the Ontario Court of Appeal confirmed that civil fraud will not usually vitiate consent to a marriage, *unless* it induces an operative mistake. For example, a mistake as it relates to a party's identity or that the ceremony was one of marriage.⁴⁸ This case has been cited with approval many times and continues to be considered as the leading case.⁴⁹ The Courts' reluctance to find that civil fraud will vitiate consent to a marriage appears to have prevented opening the floodgates to more litigation.⁵⁰ Alleging fraud where one party to the marriage has character flaws not anticipated by the other is not something the court wishes to advance as is evinced by the following select comments of the Court:

[23] "First, on a principled approach it may be difficult to differentiate immigration fraud from other types of fraud. In *Grewal v. Sohal* 2004 BCSC 1549 (CanLII), (2004), 246 D.L.R. (4th) 743 (B.C.S.C.) the fraud consisted of the defendant fraudulently representing his marital intentions for immigration purposes and fraudulently representing that he did not have an alcohol or drug addiction. **One can think of many other misrepresentations such as related to education, health or assets that might induce a decision to marry and which could be made fraudulently. If a fraud as to fundamental facts that ground the decision to marry is generally a ground for annulment, this certainly raises the spectre of an increase in the volume of costly litigation.**

[24] Even assuming that the law can logically extend to permit annulment on the basis of immigration fraud and not on other grounds of fraud, it remains that this may simply promote increased and expensive litigation. [emphasis added]"⁵¹

The Court's message, effectively, "*caveat emptor*" – the spouses ought to have conducted their due diligence before marriage.⁵² Predatory marriages are easily distinguishable from immigration fraud cases if for no other reason than, a person under disability may and likely is not, for many obvious reasons, in a position to conduct any due diligence.

⁴⁷ *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)

⁴⁸ *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.) at pp. 248 and 249

⁴⁹ See *Torfehnejad v. Salimi* 2006 CanLII 38882 (ONSC) upheld 2008 ONCA 583; *Grewal v. Kaur* 2011 ONSC 1812; *Raju v. Kumar* 2006 BCSC 439; and *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.).

⁵⁰ *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)

⁵¹ *Grewal v. Kaur* 2009 CanLII 66913 (ONSC) at paras. 23-24

⁵² *A.A.S. v. R.S.S.*, 1986 CanLII 822 (BC CA) at para. 25.

Although it may be difficult for an older spouse to have a marriage set aside on the grounds of civil fraud/tort of deceit he/she may be able to seek and receive damages for the fraud perpetrated. The case of *Raju v. Kumar*,⁵³ involved a wife who was awarded damages for civil fraud in an immigration fraud case where the court notably stated:

[69] “The four elements of the tort of deceit are: a false representation, knowledge of its falsity, an intent to deceive and reliance by the plaintiff with resulting damage. [. . .]

[70] I find the defendant misrepresented his true feelings towards the plaintiff and his true motive for marrying her order to induce her to marry him so he could emigrate to Canada. I find the plaintiff married the defendant relying on his misrepresentations of true affection and a desire to build a family with her in Canada.

[71] The defendant’s misrepresentations entitle the plaintiff to damages resulting from her reliance on them.”

The Court limited damages to those incurred for the wedding (cost of the reception, photos and ring), supporting his immigration to Canada (including his application, immigration appeal and landing fee) and the cost of her pre and post marriage long distance calls.⁵⁴

The Court is open to allowing a claim of fraud in financial elder abuse. The older adult would have to prove that the perpetrator knowingly made a false representation to the older adult, with an intent to deceive him and on which he relied, causing him damage.

⁵³ *Raju v. Kumar* 2006 BCSC 439

⁵⁴ *Raju v. Kumar* 2006 BCSC 439 at para. 72. See also the recent case of *RKS v. RK* 2014 BCSC 1626, where the Court dismissed a claim alleging the tort of deceit. A wife alleged that she was induced into marrying her husband on false representations that he was heterosexual, while in fact he was not. The wife also sought an annulment of the marriage citing non-consummation. The Court dismissed the claim and refused to grant an annulment as there was no evidence that the groom or groom’s family made any false representations to either the bride or her family with an intent to deceive the plaintiff into marrying him. Prior to the wedding the plaintiff and her family had asked many questions about the defendant’s background, his education, his financial situation and the kind of woman he was looking to marry. The Court found that the wife’s claim for damages for the tort of deceit had to fail as it found that the husband never made any representations, prior to the wedding, about his sexual orientation. Furthermore the wife could not prove with medical or other evidence that the marriage was not consummated. The husband testified that it had been consummated. The Court denied the wife’s claim for an annulment and granted a divorce instead.

In the predatory marriage context it could be argued that the predator spouse falsely represented to the older adult that she would look after and care for him. The older adult relies on this representation when he chooses to marry her and he suffers damages. A claim in civil fraud, in a predatory marriage case, would likely have to be made before the older adult passes away.

15. Lack of Independent Legal Advice (“ILA”)

The older adult in financial abuse situations or in predatory marriages is often deprived of the opportunity to seek and obtain independent legal advice before entering into the transaction or prior to marrying. Lack of independent legal advice is an oft considered factor in the setting aside of domestic contracts. Whether such arguments could be extended to set aside the marriage itself is a consideration worthy of a court’s analysis.

Courts have consistently held that “*marriage is something more than a contract*”,⁵⁵ as such, there could well be judicial reluctance to extend contract law concepts and use them as a vehicle to set aside actual marriages, as opposed to simply setting aside marriage contracts. It is largely unclear whether such arguments extend to parties other than those to the marriage. If the victim so to speak dies, arguments may be difficult to pursue. However, parties such as children of the older adult are impacted by the union. This is a different approach to that of cases where capacity is challenged on the grounds of incapacity and the marriage then declared to be void *ab initio*, since these unions can be challenged by other interested parties.⁵⁶

⁵⁵ See *Ciresi (Ahmad) v. Ahmad*, 1982 CanLII 1228 (ABQB); *Feiner v. Demkowicz (falsely called Feiner)*, 1973 CanLII 707 (ONSC); *Grewal v. Kaur*, 2009 CanLII 66913 (ONSC); *Sahibalzubaidi v. Bahjat*, 2011 ONSC 4075; *Iantsis v. Papatheodorou*, 1970 CanLII 438 (ONCA); *J.G. v. S.S.S.*, 2004 BCSC 1549; *Torfehnejad v. Salimi*, 2006 CanLII 38882 (ONSC) at para. 92; and *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 (H.L.).

⁵⁶ *Ross-Scott v. Potvin* 2014 BCSC 435 at para. 73

PROVINCIAL/TERRITORIAL LEGISLATION

Besides remedies found under the *Criminal Code*⁵⁷ (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
- Public Guardian and Trustee Legislation

A small number of jurisdictions have adult protection laws that apply to adults who meet a definition of an “adult in need of protection”. These include British Columbia,⁵⁸ Yukon,⁵⁹ Prince Edward Island,⁶⁰ and New Brunswick.⁶¹ 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*.⁶² 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.

⁵⁷ RSC 1985, c.C-46

⁵⁸ *Adult Guardianship Act*, RSBC 1996, c. 6

⁵⁹ *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A.

⁶⁰ *Adult Protection Act*, RSPEI 1988, c A-5

⁶¹ *Family Services Act*, SNB 1908, c F-2.2

⁶² *Adult Protection Act*, RSNS 1989, c.2

In British Columbia,⁶³ Alberta,⁶⁴ Manitoba,⁶⁵ Ontario⁶⁶ and Nova Scotia⁶⁷ employees or operators of care facilities have a statutory duty to report and investigate abuse. In some provinces and territories the public guardian and trustee (the PGT) has some powers to intervene in circumstances of financial abuse or abuse by a power of attorney, guardian, trustee or other substitute decision maker, but there is no duty to report to a PGT. In Yukon,⁶⁸ BC,⁶⁹ Alberta,⁷⁰ Saskatchewan,⁷¹ Ontario⁷² and Quebec⁷³ the PGT has the power to investigate abuse.

Like the *Criminal Code*, provincial and territorial legislation are essentially age neutral, there are no laws that apply exclusively to older people, the laws were made to protect people at risk. For a full list of related provincial or territorial legislation see **Appendix “A”** attached to this paper.

CRIMINAL REMEDIES

The Canadian *Criminal Code*⁷⁴ plays a role directly and indirectly, in protecting older adults from financial abuse and exploitation. Select criminal offences can be particularly useful in deterring and penalizing perpetrators of financial abuse.

While the *Criminal Code* does not provide for the specific offence of "elder abuse", or "financial abuse" there are however certain offences under which such a perpetrator could be charged, including under:

- **Section 215: Failing to provide the necessities of life (criminal neglect)**

⁶³ *Community Care and Assisted Living Residential Care Regulation*, BC Reg 96/2009 Sched. D

⁶⁴ *Protection for Persons in Care Act*, SA, 2009 C.P-29.1

⁶⁵ *The Protection for Persons in Care Act*, CCSM, c P144

⁶⁶ *Long-Term Care Homes Act*, SO 2007, c8

⁶⁷ *Protection for Persons in Care Act*, SNS 2004 c 33

⁶⁸ *Public Guardian and Trustee Act*, SY 2003, c 21 Sch C, Part2 s.9(1)

⁶⁹ *Public Guardian and Trustee Act*, RSBC 1996, c 383 s.17

⁷⁰ *The Adult Guardianship and Trusteeship Act*, SA 2008, cA-4.2 ss75-77

⁷¹ *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 s40.7

⁷² *Substitute Decisions Act*, SO 1992, c 30, s27.

⁷³ *Pubic Curator Act*, RSQ, c C-81

⁷⁴ RSC 1985, c. C-46

- **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**
- **Section 380-388: 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*⁷⁵ 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.

A review of some recent criminal cases dealing with elder financial abuse is set out below:

***R v. Gliddon* 2017 ABPC 38 – Fraud over and Fraud under \$5000**

The perpetrator pleaded guilty to three counts of fraud, two over \$5,000 and one under \$5,000 contrary to section 380(1)(a) and (b) of the *Criminal Code*. This was his sentencing decision and it focused on what constitutes “vulnerable victims” and “positions of trust” under the s.718 sentencing provision.

The fraud involved the perpetrator approaching three older adults (ages 84-87) claiming that repairs and serious renovations were required on their homes due to several deficiencies. The perpetrator took close to \$30,000 from these older adults but failed to complete any renovations on their properties. One older adult's financial situation deteriorated so much based on these payments to the point where her cheques were returned NSF.

Under the aggravating factors considered in the sentencing, the Court first commented on the “vulnerability of the victims”. There was no doubt that one victim was vulnerable as he was diagnosed with Alzheimer's disease and was showing signs of deteriorating cognitive skills. However with respect to the other two victims, the Court asked:

[23] Should I find Ms. Sholte and Mr. Allen “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) 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

⁷⁵ SC 2015 c 13 s 2

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.

[24] 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.**

The Court had looked to the definition of “Elderly” as defined in *The Oxford English Dictionary, Second Edition*, (Oxford: Oxford University Press, 1991) Volume V at p. 113 as “somewhat old, verging towards old age; of or pertaining to one in later life.” As well as the definition of “vulnerable” as defined in OED as “open to attack or injury of a non-physical nature”.

While the Crown also argued that the offences constituted abuses of positions of trust (under section 718.2(a)(iii)), the Court disagreed. The Crown relied on cases that interpreted “position of trust” with respect to section 153(1) of the *Criminal Code* that deals with positions of trust and “young persons” and protecting them from adults that would sexually exploit them. Under s. 718.2(a)(iii) the Court in this case noted that “position of trust” is a more restricted concept than simply a situation in which the complainant “trusted or relied on a person”. In Justice Fradsham’s view, the use of the word “position” denoted a manifest or perceivable relationship which has, as one of its reasonably expected elements, the “mental attitude of trusting in or relying on a person”. The Court found that the phrase “position of trust” should not lose its significance by an overly broad interpretation. This was not a situation where there was a teacher / student

relationship, or where the offender was living with the vulnerable victim. The Court could not find that the perpetrator was in a position of trust with the victims; this was “no more than an ordinary commercial relationship between the offender and the complainants.”⁷⁶

Ultimately, after reviewing the sentences ordered in several similar cases,⁷⁷ the Court sentenced the perpetrator to a global period of incarceration of 730 days (i.e. two years measured at 365 days per year) with credit for 324 days of pre-sentence custody, leaving him with 406 days left to serve.

***R. v. Bernard* 2015 BCSC 107 – Fraud over \$5000**

Joseph Bernard⁷⁸ 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:

⁷⁶ *R v Gliddon* 2017 ABPC 38 at para. 41

⁷⁷ *R. v. Rockett* (2009) 283 Nfld & PEIR 247 (PEICA); *R v Bernard* 2015 BCPC 107; *R v Drakes* 2006 CarswellOnt 8638 (SCJ); *R v Bullock* (2013) 542 AR 280 (CA); *R v Green* (2008) 229 Man R (2d) 202 (Pv Ct); *R v Adler* (1999) 208 NBR (2d) 381 (CA); *R v Johal* 2012 BCPC 133; *R v McCague* 2006 ONCJ 358; *R v Winter* 2008 CanLII 47443 (NLPC); *R v Pickering* 2012 BCPC 213; *R v Singer* 2013 ONSC 4035; and *R v Kralik* 2006 BCSC 1322.

⁷⁸ 2015 BCPC 107.

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

[47] The present case involves a breach of trust of certainly a very high nature. Mr. Crouter [the older adult] had confidence in Mr. Bernard [the fraudster], not only to live in his house and share living space without defrauding him, but to assist him in the necessary tasks which were difficult or impossible for Mr. Crouter to do himself. When he was "befriended" by Mr. Bernard, Mr. Crouter was living alone after his wife had recently moved into a care home. His only family support was from the family in Calgary. His physical and mental health were failing, and it appears from Mr. Bernard's own evidence that Mr. Crouter was not able to properly physically care for himself. Mr. Bernard purported to be Mr. Crouter's friend and caregiver at a time when Mr. Crouter desperately needed both. Mr. Crouter invited Mr. Bernard into his home in shared quarters and Mr. Bernard assisted Mr. Crouter to drive him to various visits to his wife and run other errands. He was to make sure that Mr. Bernard was taking his insulin. Mr. Bernard convinced Ms. Etchison [the sister-in-law] that he was a benevolent caregiver and that he had had prior experience with assisting other elderly persons in need.

The Court considered all of the principles of sentencing and concluded that the primary factors involved in this case were the "denunciation" of the conduct and "general deterrence so that others do not participate in similar activities". The Court noted that the perpetrator "preyed upon a vulnerable, isolated, elderly victim and a significant sentence [was] required to reflect society's abhorrence for such conduct".⁷⁹ The fraudster was sentenced to **4 years** in custody.⁸⁰

***R v. Fontana* 2017 ONSC 2964 – Fraud, Theft by Conversion**

A 76 year old woman loaned \$150,000.00 to a friend to start up her own restaurant. The friend failed to pay back the money and it was discovered she used the money for her own personal needs and to feed a gambling habit. The perpetrator was now bankrupt.

⁷⁹ 2015 BCPC 107 at para. 65.

⁸⁰ 2015 BCPC 107 at para. 66.

Both the older woman's lawyer and financial advisor advised the woman to obtain security for the loan. She chose not to follow this advice based on her friend executing a Promissory Note and advising that her house was appraised at \$350,000.00. The older woman however did not know that the perpetrator's house had already been transferred into her husband's name before the loan was made.

The "friend" was found guilty of fraud as well as theft by conversion as she took the funds for the sole purpose to set up a restaurant and not for personal use. The Court found that when she used the loan proceeds for gambling she had "no colour of right in those monies", and she knew that by gambling away the money she was depriving either temporarily or absolutely, the older woman of her money.

The Court confirmed that one of the objectives set forth in s.718 of the *Criminal Code* is to provide reparations for harm done to the victim. In this case the victim was an elderly woman who had been deprived of a substantial part of her life savings, which has had a significant impact on her both from a health perspective and a financial perspective. Also the Court found that while the conduct of the perpetrator was not a "true legal breach of trust" nonetheless it was a "breach of friendship" and was an aggravating factor the Court took into account. Also, the older woman's health and financial situation, together with her age were relevant aggravating factors. Recognizing that one of the objectives of sentencing in this case was to provide reparation to the older woman, the Court wanted to impose a sentence to reflect this objective and ordered the perpetrator to serve a conditional sentence of two years less a day with house arrest for the first nine months and to make payment of restitution of \$150,000.00. The Court noted that while it could not force the husband to sell the family home, the perpetrator had a choice. She either will, with the assistance and cooperation of her husband and family make full restitution within nine months or she faces the possibility of serving the remainder of her sentence in jail. A restitution order which survives bankruptcy is the only realistic way in which the victim will recover anything, cited the Court quoting Weiler J.A. in *R. v. Eizenga* 2011 ONCA 113 at para. 110. The Court also imposed a

fine in lieu of forfeiture in the amount of \$150,000.00 which will be reduced on a dollar for dollar basis as restitution was made. The fine must be paid within two years.

R. v. Kaziuk 2011 ONCJ 851 – Fraud, Theft, Theft by Person with POA

This case⁸¹ is interesting because although section 331 was enacted as long ago as 1984, this is one of only a few reported decision in Canada citing s. 331 in the context of abuse of older adults, and in the end, the accused was not even charged under 331. Instead, he was charged under the regular theft and fraud provisions. That said, Justice Baldwin "*found that the s.331 offence had been proven by the Crown beyond a reasonable doubt*" and that even though the accused was not charged with this offence it was an "*aggravating sentencing factor pursuant to s.725(1)(c) of the Criminal Code*".

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

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

This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim....The victim was his elderly Mother who was extremely vulnerable to him as her only child. ...Mr. Kaziuk would rip-off the wings of all the angels 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.*”⁸² 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.⁸³

***R. v. Taylor* 2012 ONCA 809 - Fraud**

The case of *R. v. Taylor* is another notable example of an abuse of trust and an aggravating factor considered in sentencing.⁸⁴ Ms. Dokaupé, now deceased, was a frail, elderly woman who suffered a number of physical challenges that limited her mobility and left her vulnerable. She employed a caregiver whom she relied upon for her daily needs. At the caregiver’s suggestion, Ms. Dokaupé executed a power of attorney for property in her favour. Ms. Dokaupé also executed a new Will that appointed the caregiver as executor. One year later, the caregiver used the attorney for property to obtain a bank card for Ms. Dokaupé’s savings account. She then drained the bank account of \$126,000, leaving only \$17,000. The caregiver used that money for her own benefit.

The caregiver subsequently left Ms. Dokaupé’s employment, and when Ms. Dokaupé’s new caregiver read Ms. Dokaupé’s bank statements, she told Ms. Dokaupé what she saw and called the police. The police charged the caregiver with fraud and obtained expert reports confirming that Ms. Dokaupé was capable of managing her property throughout the period in question, and during her discussions with police. Unfortunately, Ms. Dokaupé died before the trial took place. In her absence, the Crown relied on Ms. Dokaupé’s witness statements which had been recorded by the police. The judge

⁸¹ 2011 ONCJ 851

⁸² *R v. Kaziuk* 2013 ONCA 217

⁸³ *R v. Kaziuk* 2013 CanLII 64666 (SCC)

⁸⁴ *R. v. Taylor*, 2012 ONCA 809

accepted Mrs. Dokaupé's evidence and the expert's evidence and sentenced the accused to **21 months in prison**.

The caregiver appealed her conviction on the grounds that Ms. Dokaupé's recorded statements were hearsay and inadmissible, and on the basis of mitigating factors that should have reduced the severity of the sentence. In dismissing the appeal, Justice Rosenberg wrote:

...this was a serious offence. The appellant voluntarily placed herself in a position of trust in relation to the complainant. She became her attorney and the executor of her estate. The frail, elderly complainant was completely reliant on the appellant. This was not a one-time act but a planned and deliberate fraud committed over many months by someone whom the complainant looked upon as a friend. The appellant stole and then spent over \$126,000, almost the complainant's entire life savings. In such a case, the paramount objectives of sentencing must be deterrence and denunciation, and they cannot be adequately met by a conditional sentence.

R. v. Cousineau 2013 BCCA 289 - Fraud

The British Columbia Court of Appeal granted leave to appeal the sentence of Mr. Cousineau, who was convicted of three counts of fraud under section 380(1), and was sentenced to 18 months in jail and two years' probation.⁸⁵ The advanced age and vulnerability of his victims was considered as an aggravating factor in the court's sentencing.⁸⁶ Mr. Cousineau was employed by a seniors' facility to market the residence. On three occasions he met with potential residents and pocketed their rent deposits. In addition to the penal sentence, the court also ordered Mr. Cousineau to repay \$7,357.00 and to pay victim surcharges in the amount of \$300.00.

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

⁸⁵ R. v. Cousineau, 2013 BCCA 289

⁸⁶ R. v. Cousineau, 2013 BCSC 947 at 11 and 25.

Cousineau was self-represented on his application for leave to appeal. The Crown took the position that his appeal lacked merit, and the Court agreed. However, the Crown neglected to request an order refusing leave to appeal, so leave was granted.⁸⁷ However no appeal decision has been reported.

***R v. Davy* 2015 CanLII 10885 (ONSC) - 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.⁸⁸

This case, ***R. v. Davy***, from **Orillia, Ontario** involved a particularly heinous crime. A daughter and son-in-law were charged in 2011 and convicted in 2015 of failing to provide the necessaries of life to her elderly and vulnerable mother (s.215). The mother lived with her daughter and son-in-law and she suffered from severe dementia and from other serious medical conditions and was incapable of making personal care (and other) decisions for herself.

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

⁸⁷ *R. v. Cousineau*, 2013 BCCA 289.

⁸⁸ Laura Tamblin Watts, "Background Paper – Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts" Canadian Centre for Elder Law, March 2013, at p.6

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 necessities of life, food, water, shelter, adequate care, medical treatment of health conditions requiring treatment and protection from harm. It was clear that they failed to provide these necessities of life and they were each sentenced to 12 months in jail.

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

R. v. Hooyer 2016 ONCA 44 - Theft by Person Holding POA, 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 \$2000.00 as he submitted invoices from the facility to VAC claiming partial reimbursement and then kept the money himself.

At trial, Hooyer argued that no laws were broken because there were no limitations listed on the POA and that the husband told him he could use the money as if it were his own. Therefore he did not have the requisite mental intent to commit the offence as he honestly believed he was entitled to do what he did. The Court was not buying this. An attorney is a fiduciary with fiduciary duties and obligations that he should have known of his responsibilities. The Court found Hooyer knew the assets belonged to the husband when he used them for his own benefit.

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

***R. v. Curreri* 2016 ONSC 3598 - Fraud over \$5,000**

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

daughter and father were shocked to learn that all of his properties were in strangers' names and mortgaged to persons unknown. They went straight to the police.

The son was assisted in his fraud by a legal assistant at a real estate law firm. Both were found guilty in June 2016 – unfortunately no sentencing decision has been released yet. 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.

Application for a mistrial was overturned.⁸⁹

***R. v. Reynolds* 2016 BCPC 69 –Theft**

A daughter stole over \$300,000 from her elderly mother's bank account from 2009-2013.⁹⁰ 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 ONCJ 207- Theft, Fraud over \$5000, and Criminal Breach of Trust**

A daughter was charged with three offences.⁹¹ 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.)

⁸⁹ 2017 ONSC 3701.

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.

⁹⁰ *R. v. Reynolds* 2016 BCPC 69

⁹¹ *R.v. Bruyins* 2016 ONCJ 207

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.⁹²

CONCLUSION

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

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))

⁹² 2016 ONCJ 527

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>

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance and is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley

October 2017

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

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