

*Elder Abuse: Civil vs. Criminal Remedies*  
Estate Planning Council of Toronto  
November 6, 2018



# Introduction

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



# Overview of Elder Abuse

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



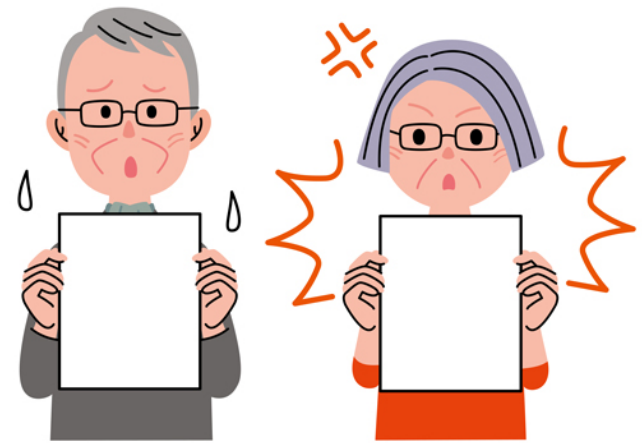
# Definition

*“A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person”*

- World Health Organization

# Examples:

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



# Examples

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



# Indicators or “Red Flags”

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



# Perpetrators

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



# Why Under-Reported?

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



# REMEDIES?

Civil vs. Criminal



# Criminal or Civil?

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



# Differences:

## Civil

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

## Criminal

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

# Other Legislation – Prov or Territorial

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

# CIVIL REMEDIES

And Real Life Cases



# Common Civil Remedies:

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

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



## **Make an attorney explain where the money went:**

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

## Make someone repay the money taken:

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



## **Declare a transfer of property invalid:**

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

## **Restitution – Through Unjust Enrichment / Constructive Trust / Resulting Trust**

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

## **Void or set aside a predatory marriage:**

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

## **Others: Breach of Contract, Tort of Civil Fraud**

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

# Real life cases:

## **“Best Interests of Mom”**

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

# Real Life Cases:

## “Go-Karts for Mother”

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



# Real Life Cases:

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

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

## Cont.

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

# CRIMINAL REMEDIES

And Real Life Cases



# *Criminal Code*

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

# Criminal Cont.

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

## **Sentencing Principals:**

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

# Real Life Cases:

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

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

# Real Life Cases:

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

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



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

# Real Life Cases:

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

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

# Real Life Cases:

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

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



# Real Life Cases:

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

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

# Conclusion



Keep eye out



Be aware of red flags



Criminal where appropriate



Civil with lesser burden

# Resources

- WEL Partners Resource Centre: <http://welpartners.com/resources/>
- CBA Elder Law Section: [www.cba.org/cba/sections\\_Elder/main/](http://www.cba.org/cba/sections_Elder/main/)
- Advocacy Centre for the Elderly: [www.advocacycentreelderly.org](http://www.advocacycentreelderly.org)
- National Initiative for the Care of the Elderly (NICE): [www.nicenet.ca/](http://www.nicenet.ca/)
- BC Law Institute's Canadian Centre for Elder Abuse: [www.bcli.org](http://www.bcli.org)
- Law Commission of Ontario, A Framework for the Law as it affects Older Adults: Advancing Substantive Quality of Older Persons through Law, Policy and Practice <http://www.lco-cdo.org/en/older-adults-final-report>

THANK YOU!  
Questions?

