



ONTARIO POLICE COLLEGE - INVESTIGATIONS INVOLVING OLDER ADULTS

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ELDER ABUSE: CIVIL AND CRIMINAL REMEDIES

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1. INTRODUCTION

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

Available civil and criminal remedies are not well understood. The differences between the two procedural avenues, and when one type of remedy may be more suitable than another will be explored as well as contextually why we need these remedies.

2. ELDER ABUSE: OVERVIEW

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

Elder abuse often occurs at the hands of someone familiar: a family member, friend, or caretaker. In fact, in 2019, Statistics Canada reported that approximately one third of reported cases of physical violence against older adults were perpetrated by a family member.¹ Other perpetrators can include other seniors who reside with the older adult victim in a nursing or retirement home.

Elder abuse is also often unreported for a variety of reasons which will be explored shortly, including stigmatization, embarrassment, or lack of awareness or ability to vocalize concerns. As elder abuse is often propagated by familiar persons, there is often the added concern that reporting abuse will cause trouble or eliminate the support which the older adult is reliant on. In 2019, Statistics Canada reported that the rate of police-reported

¹ Shana Conroy, "Family violence in Canada; A statistical profile, 2019" (2 March 2021), online: *Juristat* <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00001-eng.pdf?st=cUAIJLLU>>.

violence against seniors aged 65 to 89 in Canada was 227 per 100,000 people, and 55% of victims were men.²

Older adults were particularly vulnerable during the COVID-19 pandemic, which has exacerbated an already upward trend of elder abuse.³ As a result of the global crisis, restrictions were imposed throughout the country which led to increased isolation of senior populations, and decreased access to medical and caregiving services. Given the confluence of factors caused by the pandemic, there was a noticeable shift in the social proclivity of all populations, but especially the older adult population which is often reliant on social services and social programs. While comprehensive data about elder abuse during the pandemic is still being studied, it seems that COVID-19 created the perfect breeding ground for abusive relationships to thrive. One organization noted that calls to their 24-hour seniors safety line rose by 250%, while two other organizations noted a ten-fold increase in calls since the outset of the pandemic.⁴ According to research gathered in 2023 by the Department of Justice Canada, about 45% of seniors still report experiencing some form of abuse from the age of 65 onwards.⁵

According to the Canadian Department of Justice, financial abuse is the most commonly *reported* type of abuse against older adults.⁶ However, the Department of Justice also commented on the difficulty in estimating the accurate prevalence and incidence of elder abuse in Canada due to obvious factors associated with under-reporting.⁷ Financial abuse can look like anything including: improper use of bank accounts and/or joint bank

² *Ibid*, Shana Conroy, “Family violence in Canada; A statistical profile, 2019”.

³ Isobel Mackenzie, “*Hidden and Invisible: Seniors Abuse and Neglect in British Columbia*” Office of the Seniors Advocate British Columbia, December 2021, online: <<https://www.seniorsadvocatebc.ca/app/uploads/sites/4/2021/12/Hidden-and-Invisible-Report.pdf>>.

⁴ House of Commons, “*Elder Abuse: Identifying the Issue and Combatting All Types of Abuse: Report of the Standing Committee on Justice and Human Rights* (June 2021) (Chair: Iqra Khalid), online: <<https://www.ourcommons.ca/Content/Committee/432/JUST/Reports/RP11454619/justpr10/justpr10-e.pdf>>.

⁵ Dr. Asa Don Brown, “*The Rise of Elder Abuse*” Canadian Counselling and Psychotherapy Association (September 2023) online: CCPA <<https://www.ccpa-accp.ca/the-rise-of-elder-abuse/>>

⁶ Government of Canada, “*Backgrounder Elder Abuse Legislation*” (15 March 2012), online: <<https://www.canada.ca/en/news/archive/2012/03/elder-abuse-legislation.html>>.

⁷ *Ibid*, Government of Canada, “*Backgrounder Elder Abuse Legislation*”.

accounts; forgery or abuse involving a power of attorney document; sharing an older adult's home without payment of; or sharing in, expenses; misuse; appropriation; or theft of an older adult's assets; transfer of real property; ATM fraud and other.⁸ Often financial abuse is conducted by a family member upon whom the older adult is dependent and who is potentially influenced by or controlled and victimized.⁹ Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust (where there is a power imbalance).¹⁰ Financial abuse often occurs in connection with other types of abuse. For example, an attorney under the power of attorney document may refuse to provide an older adult with funds to pay for groceries or provide for other necessities of life.

According to the World Health Organization, “elder abuse” is:

A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person.¹¹

The United States’ Centers for Disease Control and Prevention (the “CDC”) defines elder abuse as:

An intentional act or failure to act that causes or creates a risk of harm to an older adult.¹²

⁸ Public Health Agency of Canada, “Facts on Financial Abuse of Seniors” (2009); see also, Government of Canada, “Elder Abuse: It’s Time to Face the Reality” (July 26, 2012), online: < <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/prevention-resource-centre/prevention-resources-older-adults/elder-abuses-time-face-reality.html>>.

⁹ Ontario Provincial Police, *Tip Sheet on Abuse of Older Adults*; see also, Elder Abuse Prevention Ontario, *Reporting*, online: <<https://eapon.ca/reporting/>>.

¹⁰ Advocacy Centre for the Elderly, “Community Training Manual”, Third Ed., December 2002, online: < [http://www.advocacycentreelderly.org/appimages/file/eamanualsec1\(2\).pdf](http://www.advocacycentreelderly.org/appimages/file/eamanualsec1(2).pdf) >.

¹¹ World Health Organization, “Elder Abuse” (June 13, 2022), online: <<https://www.who.int/news-room/fact-sheets/detail/elder-abuse>>.

¹² Centers for Disease Control and Prevention, “What is Elder Abuse” (June 2, 2021), online: <<https://www.cdc.gov/violenceprevention/elderabuse/definitions.html>>.

The CDC defines an “older adult” as “someone aged 60 or older” and notes that the older adult population is growing faster in the United States than are younger populations. Accordingly, the CDC advocates for more research in order to uncover the causes for, and solutions to, violence against older adults.¹³

A consistent definition for elder abuse would also be helpful in combatting violence against older adults. Unfortunately, elder abuse has been (1) poorly or imprecisely defined, (2) defined specifically to reflect the unique statutes or conditions present in specific locations (ie. states, counties or cities), or (3) defined specifically for research purposes. As a result, a set of universally accepted definitions does not exist.¹⁴

Elder Abuse includes:

- **Misuse of a Power of Attorney Document:** Misusing a Power of Attorney for Property document, which is a legal document where a person (the “grantor”) gives another (the “attorney”) the legal authority to make financial decisions on the grantor’s behalf;
- **Theft and Fraud:** Stealing an older adult’s money, pension cheques, or possessions, and/or committing fraud, forgery or extortion;
- **Shared Residence:** Sharing an older adult’s home without paying rent, or a fair share of the expenses;
- **Undue Influence:** 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;
 - begin legal documents that are not understood;

¹³ *Ibid*, Centers for Disease Control and Prevention, “*What is Elder Abuse*”.

¹⁴ Ontario Human Rights Commission, “*Elder abuse & neglect*”, online: < <https://www.ohrc.on.ca/en/time-action-advancing-human-rights-older-ontarians/elder-abuse-neglect>>.

- gift money to relatives, caregivers or friends; and/or
- engage in paid work to bring in extra money
- **Psychological Abuse:** Isolating an older adult or the threat of isolation and the withholding of social and familial relationships in order to gain control or leverage a benefit (i.e., an adult child who threatens their older adult parent that he or she cannot see their grandchildren unless they guarantee a loan or give the adult child money;
- **Failure to Provide the Necessaries of Life:** An attorney under a power of attorney document is a fiduciary who is obligated to provide the grantor with the necessaries of life, that include for example, shelter, food, medication, and assistive devices;
- **Predatory Marriages:** A predatory marriage is where a person marries an older adult in order to gain access to their money and assets; and/or
- **Violence and/or Abuse:** Domestic violence, physical or sexual abuse.¹⁵

SOME INDICATORS OF ABUSE ON AN OLDER ADULT INCLUDE...

- ❖ Physical signs of abuse and/or unusual/unexplained accidents or injuries
- ❖ 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 or social behaviours

¹⁵ Generally, for more information on the particulars of Elder Abuse, see the resources available from the Advocacy Centre for the Elderly ("ACE"), online: <http://www.advocacycentreelderly.org/elder_abuse_-_introduction.php>.

- ❖ 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 (ie., lost jewelry or silverware)
- ❖ Changes in Power of Attorney documents
- ❖ Being overcharged for services or products by providers
- ❖ Being denied the right to make independent financial decisions¹⁶

The most frequent perpetrators of abuse on older adults are their adult children, their service providers, strangers, or even spouses (especially in the predatory marriage context where unscrupulous individuals prey upon older adults with diminished reasoning ability purely for financial gain).

Frequently, adult children who harm their parents have various health concerns themselves, including issues related to mental health, substance abuse, social isolation, and employment and financial dependency on the older person.¹⁷ The abuser may rationalize the abuse thinking that they deserve the benefit of the victim's money as they are the older adult's child.

As mentioned, older adult abuse is under-reported for several reasons and often because the older adult:

¹⁶ For more information on the indicators of elder abuse, see generally, Elder Abuse Prevention Ontario, "*Learn the Facts*", online: < <https://eapon.ca/learn-the-facts/>>.

¹⁷ Laura Tamblyn Watts, "*Background Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts*" Canadian Centre for Elder Law (March 2013), online: CanLII <<https://canlii.ca/t/27wk>>.

- feels guilt, blameworthiness, shame, or embarrassment for 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;
- can minimize, rationalize or deny the abuse altogether;
- may not even recognize the abuse;
- may not be able to report the abuse, physically or otherwise, even if they have a desire to (ie., the victim may be suffering from dementia or lack the requisite mental capacity to report the abuse);
- is worried about stigma on the family; and/or
- is resistant to having strangers in their home to provide services that are otherwise provided for by the abuser.

Notwithstanding the above, the Office of the Seniors Advocate in British Columbia released a paper in December 2021 detailing the results of a systemic review of seniors' abuse and neglect in British Columbia.¹⁸ The paper highlights that previously made reports of abuse and neglect by people 65 and over have increased significantly in the past six years and showed increasing reporting numbers with respect to various types of abuse. The paper described a 49% increase in reports of abuse, neglect and self-neglect to health authorities (Designated Agencies), a 69% increase in reports of victims of violent

¹⁸ Isobel Mackenzie, "*Hidden and Invisible: Seniors Abuse and Neglect in British Columbia*" Office of the Seniors Advocate British Columbia, December 2021, online: <https://www.seniorsadvocatebc.ca/app/uploads/sites/4/2021/12/Hidden-and-Invisible-Report.pdf>.

crime to the RCMP, an 87% increase in reports of physical abuse to the Vancouver Police, a 49% increase of financial abuse to the Vancouver Police, a 30% increase in reports of abuse to bc211, and a 5% increase in reports to the Seniors Abuse and Information Line.

Furthermore, the paper also noted concerns regarding the lack of public awareness, a fragmented reporting and response system, gaps in service, and the need for training for those working with seniors in the community and made five recommendations to undertake to remedy these concerns and attenuate the rise and consequences of elder abuse. This is a chief concern currently in British Columbia given the increasing aging population.

3. CIVIL & CRIMINAL REMEDIES

Once elder abuse is reported or discovered, there are at least two avenues that can be followed in pursuit of a remedy: a civil proceeding in court (i.e., lawsuits between private parties) or a criminal proceeding (i.e., where an individual is charged under the *Criminal Code*¹⁹ by the Crown).

While criminal prosecution is a possibility in the context of elder abuse, it is not always an ideal response for a variety of reasons: prosecutions are often difficult since the victim may be reluctant to cooperate in a prosecution of a loved one; the older adult victim may be in poor health; the prosecution takes so long that the victim dies before the case goes to trial; or, the abuser may be the only significant person in the victim's life, and as such, to report them or testify against them would result in loneliness and pain from the perceived consequences.

For a number of reasons, financial abuse of older adults does not always attract criminal charges. A victim may be unable or unwilling to extricate themselves from the presence of undue influence and may refuse ultimately to report a loved one, or care provider to the police. This is especially true in circumstances where the older adult relies on the perpetrator for care and needed assistance.

¹⁹ *Criminal Code*, RSC 1985, c.C-46.

In some cases, the police may even decline to investigate at all on the basis that such issues may *appear* not to be criminal in nature, but rather thought to be *civil*. We seek to demonstrate there are several sections of the *Criminal Code* that may well be under-utilized due to this apparent misperception that such matters are best suited to civil recourse rather than criminal.

While anyone can commence a civil action (as opposed to relying on the Crown to pursue charges), there are still many barriers to overcome in order to achieve justice for victims in civil courts. Civil remedies are only available to those who can afford this costly process. Hiring a lawyer is expensive. Civil litigation can also potentially take many years, which poses a practical problem for an older adult plaintiff/ applicant who may not have the luxury of time. In certain situations, if the elements can be met under an applicable section of the *Criminal Code*, it may well be more appropriate for criminal remedies to be explored and pursued.

There are a number of federal and provincial/territorial laws that may also apply to abuse of seniors. Federally, besides the *Criminal Code*, privacy legislation is also relevant. Additionally, 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.²⁰

CIVIL REMEDIES

Civil remedies are mainly about restitution, meaning placing the victim back into the place he or she would have been had the wrongful act never occurred. In other words, to have the perpetrator pay back the money they took and face an imposed punitive cost consequence (this is also known as “damages”). While there may well be some element of restitution in criminal cases, the guilty perpetrator would likely be sentenced to jail, probation, or some other punitive outcome that may not include a return of the taken money. Furthermore, in some civil decisions, courts have signaled their willingness to order custodial sentences where necessary, especially in breach of trust cases. Another

²⁰ See Appendix “A” to this paper for a list of provincial/territorial legislation.

remedy available to a civil court is to make a “declaration” that real property, or a bank account, for example, beneficially belongs to the older adult, where the perpetrator wrongfully assumed control of it.

In a civil court proceeding, the plaintiff (i.e., the older adult/victim) must use evidence to prove on a “balance of probabilities” (i.e. more likely than not) that the perpetrator caused the harm, as opposed to the criminal standard of proof, being “beyond a reasonable doubt”. This difference in evidentiary requirement is one way to determine which remedial route would be more appropriate: if the evidence is not available to prove a crime occurred on the higher criminal standard, being “beyond a reasonable doubt”, then the civil route with the lower standard, being “on a balance of probabilities”, may well be more suitable.

Lawyers practicing civil litigation often see two types of financial elder abuse that can be remedied in the civil courts:

- (1) **Breach of fiduciary duty** by a substitute decision maker. For example, In Ontario, someone who is acting as an attorney under a power of attorney for property, or under a continuing power of attorney for property must also fulfill certain ethical, moral and legal duties/obligations. That attorney’s actions are fiduciary in nature and are governed legislatively by the *Substitute Decisions Act, 1992*²¹. These statutory provisions exist alongside parameters established in the common law that govern a fiduciary’s actions.²²
- (2) **An “inadvertent” transfer of assets**, meaning, the transfer of money, real property (i.e., houses, land, condos, cottages), property rights, or beneficial rights, by a vulnerable adult to another person. Some ways this happens is through an outright transfer to another, the transfer of property into joint names, or a “miscommunication” over a “loan vs. gift”. The perpetrator, for example, argues the loan was a gift, yet the victim insists it was a loan. Or an abuser obtains rights to a vulnerable adult’s property through a predatory marriage. The abuser, for example,

²¹ *Substitute Decisions Act, 1992*, SO 1992 c 30.

²² See for example, *Andreasen v Daniels-Ferrie*, 2001 BCSC 1503, at [para 27](#).

preys on someone who lacks capacity, or unduly influences them into marriage, so they can appropriate all the property rights of their older adult spouse.

The Power of Attorney Document

Power of Attorney documents differ as between jurisdictions. For instance, in British Columbia, Enduring Power of Attorney documents (“**EPOAs**”) are the most popular document for advance planning.

In Ontario the terminology surrounding Power of Attorney documents differs slightly. For example, the person appointing the attorney under a power of attorney is called a “grantor” rather than a “donor”. While Ontario and British Columbia both have General and Limited Power of Attorney documents, it is a *continuing* power of attorney for property (“**CPOAP**”) that Ontarians use to make sure that their financial affairs are looked after at a time when they (being the grantor) can no longer look after their affairs alone, either temporarily, as agent, and/or permanently when incapable. Much to the surprise of many, the CPOAP is effective immediately upon execution unless there is a provision or “triggering” or “springing” mechanism in the document itself which says that it is only to come into effect on a certain date or upon a certain event, such as the incapacity of the grantor.

The powers granted to an attorney acting on behalf of an incapable person are extensive. An attorney operating under an EPOA whether in British Columbia, or a CPOAP in Ontario has the power to do anything on behalf of the donor/grantor that the grantor could do themselves if capable, except make a Will. These powers are subject to legislative governance and various conditions imposed by the common law.

In British Columbia, the *Power of Attorney Act*²³ governs, setting out the powers conferred on attorney by way of an EPOA,²⁴ and particularizes the obligations and duties of an attorney under an EPOA.²⁵

²³ *Power of Attorney Act*, RSBC 1996 c 370.

²⁴ *Ibid*, *Power of Attorney Act*, ss. 20-21.

²⁵ *Ibid*, *Power of Attorney Act*, s. 19.

Civil Remedies Regarding Power of Attorney Documents

When there is an abuse of the powers granted under a power of attorney, there are several legal remedies available in the civil litigation system, including removal of the attorney, requesting that the attorney account, setting aside impugned transactions, and/or repayment or restitution of money taken from the donor.

Removal of Attorney

In British Columbia, if an attorney under a power of attorney document abuses their power and the donor is incapacitated, one remedy is to ask the civil court to declare the donor to be incapacitated and appoint a committee of estate, under the *Patients Property Act*²⁶, to make financial and legal decisions for the incapable donor, or a monitor to oversee the attorney's actions on behalf of the donor. The appointment of a committee, whether it is a family member or the Public Guardian and Trustee, cancels the Power of Attorney document.

Under section 34 of the *Power of Attorney Act* in B.C, a concerned person may make a report to the Public Guardian and Trustee regarding any abuse or undue influence by an attorney. The Public Guardian and Trustee must then review the report and decide upon next steps, which could include investigating or applying for a court order to terminate all or part of an EPOA.²⁷

Further, any person who makes a report to the Public Guardian and Trustee, may also apply to the court for various remedies, including an order terminating the EPOA, or a declaration that the EPOA and all actions done under it are void.²⁸

Removal of an attorney, however, is often a more extraordinary remedy. Not every mistake or error by an attorney should result their removal. Borrowed from the law of

²⁶ *Patients Property Act*, RSBC 1996, c 349.

²⁷ See *British Columbia (Public Guardian and Trustee) v Ferrier*, 2017 BCSC 2142.

²⁸ *Supra*, note 23, *Power of Attorney Act*, s 36(5).

trusteeship, the Supreme Court of British Columbia has held that there is a certain degree of mistake or neglect of duty that must be met in order to remove a fiduciary, which is tantamount to actions or omissions by the fiduciary which endanger the subject (here the donor), or which show a lack of honesty, reasonable fidelity, or proper capacity to execute the fiduciary's duties.²⁹ In its analysis, the Court will focus on the best interests of the donor.

In Ontario, the *Substitute Decisions Act, 1992* prescribes the court procedure for holding an attorney accountable for its actions and permits for a court to order that an attorney be removed and, further, can prohibit them from acting as an attorney under a Power of Attorney document.³⁰

Order to “Account” (i.e., Produce Evidence of How the Money was Spent)

One civil remedy to address any money wrongfully taken by an attorney under power of attorney is to ask the civil court to order an accounting of how the donor/grantor's money was spent. The attorney would need to provide details of all transactions undertaken for the donor/grantor (i.e., to provide financial documents and back-up to show how he or she was spending the money). This process is called an “accounting”.

The duty to account arises out of an attorney's *fiduciary* obligation to the donor/grantor, as their agent, to exercise reasonable care, as would a typical person managing their own affairs, in making decisions that are not contrary to the interests of the donor/grantor.³¹ This long-standing standard of care for an attorney has now been codified in section 19 (1)(d) of the *Power of Attorney Act*, and in greater detail in sections 2(1) and (2) of the

²⁹ Putman v Putman, 2021 BCSC 1700, at paras 105-6.

³⁰ See generally, *supra* note 21, *Substitute Decisions Act, 1992*.

³¹ *Supra* note 22, *Andreasen v Daniels-Ferrie*, at para 27.

*Power of Attorney Regulations*³², that provide robust record keeping obligations on those acting under an EPOA. Additionally, the duty to account can also be found in case law.³³

Not every breach of duty, generally, equates to a breach of fiduciary duty. A breach of fiduciary duty is a specific type of breach of loyalty to the donor/grantor, including for instance, where the fiduciary is “acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith”.³⁴

In British Columbia only the donor of the authority, or their estate, may apply to have the attorney provide a full accounting of the attorney’s activities.³⁵

In Ontario, at the hearing of an accounting application under the *Substitute Decisions Act, 1992*, the civil court will consider the evidence and look at the accounts and the conduct of the attorney. Judges have a 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 *Substitute Decisions Act, 1992*, it is open to the court to make a finding that there has been a breach of fiduciary duty.

Repay Money Improperly Taken

If the civil court finds that an attorney under a Power of Attorney document improperly took money from the donor/grantor or did not pursue another who, for example, did not repay a “loan” from 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.

³² *Power of Attorney Regulations*, BC Reg 20/2011.

³³ See [McEwen v Jenkins and Bradley, 1958 CanLII 69](#) (SCC); *Brown v Brown*, 2011 [BCSC 649](#); *Sull v Pengelly*, 2019 [BCSC 575](#).

³⁴ *Meng Estate v Liem*, 2019 BCCA 127, [at para 25](#); see also *Girardet v Crease & Co* (1987) [11 BCLR \(2d\) 261 \(BCSC\) at para 263 \(SC\)](#).

³⁵ *Supra* note 33, *Sull v Pengelly*, at [para 116](#).

“Set Aside” a Transfer of Title or Bank Account into Joint Names

Older adults may transfer real property into a joint tenancy with one or more of their adult children. Sometimes, this is a planning technique used to avoid estate administration tax on the theory that title to the parent’s property, once the parent has died, will automatically transfer to the adult child.

Older adults may also add their adult children jointly 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 of them.

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 may open a joint account with one of their adult children. Then the older adult dies. The adult child who is jointly named on the bank account says all of the money is now theirs because, *“That’s what Mother wanted”*. The other children cry foul and contended *“No, mother wanted the money to be split between all her children”*, which is where the lawyers come in. A civil court can make a declaration that the money or property belonged solely to mother and order that title be returned and/or that any money taken be returned as well.

Restitution (Unjust Enrichment/Constructive Trust/Resulting Trust)

A court can declare that although the abuser may have “legal” title to property, the “beneficial” title belongs to the older adult. In other words, while the name on the property is that of the abuser, the property *really* belongs to the older adult.

This may occur where an abuser has been “unjustly enriched”. An abuser has been unjustly enriched where a benefit has been given to them (i.e., the older adult made payments on the abuser’s mortgage, or made the abuser a joint tenant on title), to the

detriment of the older adult and there is no lawful reason for it to have happened.³⁶ If the court finds that the abuser has been unjustly enriched, then the court can order that money be paid back to the older adult, or order that the property the abuser holds is being held “in trust” for the older adult.

Another type of trust which can be ordered in favour of older adult victims is a “resulting trust”. Often, property or bank accounts will be transferred gratuitously from an older adult to an adult child so that the child may assist them with the management of property and/or banking. In 2007, the Supreme Court of Canada held that when a gratuitous transfer of this nature is made to an adult child, there will be a presumption that the child holds the property/money in/on trust for the parent.³⁷ This is because equity presumes bargains, not gifts. In other words, while title to a property/asset is given to a fiduciary/child gratuitously, the law presumes that the intention of the transfer was not to provide the recipient a gift but, rather, to have the recipient hold the property/asset for some time and eventually return it to the original title owner. This presumption is rebuttable if the transfer can be shown to have been intended to be a gift.

Setting Aside or Declaring a Predatory Marriage as “Void”

Another form of financial abuse is where an older adult inadvertently transfers property or beneficial rights through a predatory marriage.

A predatory marriage is one where unscrupulous opportunists prey upon, in particular, older adults with diminished reasoning ability purely for financial gain through the contract of marriage (as marriage brings with it a wide range of property and financial entitlements). For example, while no longer the case in Ontario, nor British Columbia, in some other Canadian jurisdictions marriage still revokes a Will. Therefore, if the victim of such a marriage had a Will in place, it would be revoked and the perpetrator, as a spouse, would stand to inherit under intestacy legislation.

³⁶ See [Garland v Consumers' Gas Co, 2004](#) SCC 25, at para 50 and [Kerr v Baranow, 2011](#) SCC 10.

³⁷ *Pecore v Pecore*, [\[2007\] 1 SCR 795](#).

The overriding problem with predatory marriages is that they are not easily challenged at common law. Recent cases indicate that success in righting this type of wrong depends on the existence of sufficient, compelling medical evidence of incapacity.

Traditionally, one might argue that the older adult did not have the requisite capacity to enter into the marriage. However, the older adult will likely be considered capable of marriage if they can appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one's children. Also, they might be required to have the requisite capacity to manage property and make personal care decisions.

Historically, case law developing the understanding that marriage is a simple task not requiring a high degree of intelligence is the criterion upon which one can conclude that it is increasingly easy to have the capacity to marry, and therefore courts often find that the older adult was capable even in the most obvious cases of exploitation.³⁸

Ontario Court Decisions Highlighting Civil Remedies: 2010 - 2024

Adam v Adam, 2023 ONSC 3093

In **Adam v Adam, 2023 ONSC 3093**, the court was tasked with determining whether the current Attorney under Power of Attorney for Personal Care, Bibi Hasena Hanuman, should be removed from her role due to allegations of neglect. Shyam Mohamed Adam, a 58-year-old man who had suffered a serious head injury in April 2022, was the subject of the dispute. He had been in and out of hospitals over the following months and was living in an assisted living facility at the time of the hearing. His son, Shazad Adam, filed an application seeking to replace Bibi, Shyam's spouse, as his Guardian of the Person. Shazad argued that Bibi had not acted in Shyam's best interests and should be removed

³⁸ For more information on predatory marriages see: Kimberly A. Whaley and Albert H Oosterhoff, "Predatory Marriages", Law Society of Ontario, Six-Minute Lawyer, 2018, online: *WEL Partners* <<http://welpartners.com/resources/WEL-six-minute-estates-lawyer-predatory-marriages-2018.pdf>>; Kimberly Whaley et al, *Capacity to Marry and the Estate Plan*, (Aurora: Canada Law Book, 2010); Albert H. Oosterhoff, "Predatory Marriages" (2013) 33 ETPJ 24, Kimberly Whaley and Albert H Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 ETPJ 269.

as attorney for personal care, a role she was granted in a power of attorney for personal care executed in 2019.³⁹

Shazad's application was based on claims of Bibi's neglect of Shyam's care and her breach of a court order.⁴⁰ The court found that compelling evidence of misconduct or neglect was required to disturb a person's selection of an attorney under a Power of Attorney for Personal Care.⁴¹ In this case, the court concluded that Shazad had provided sufficient evidence of Bibi's neglect, specifically citing her failure to comply with a prior court order. Bibi had also reportedly enabled Shyam's alcoholism during her time as his attorney for personal care by supplying with him alcohol while having knowledge of the fact that Shyam was an alcoholic and that he had a tendency to partake = in dangerous activities when under the influence.⁴² Due to the reasons present, the court ruled in favor of Shazad, demonstrating that civil remedies such as the removal of an attorney for personal care are available when there is misconduct or neglect in the care of an incapacitated individual.

Toller James Montague Cranston (Estate of), 2021 ONSC 3704

In *Toller James Montague Cranston (Estate of), 2021 ONSC 3704*, the court dealt with an estate dispute where the executor, the applicant, was accused by her two brothers and co-heirs of theft and fraud in managing their late sibling's estate. The late sibling was a renowned Canadian Olympic skater and artist, who had amassed significant assets, including valuable art and properties in Mexico.

The applicant had personally paid for numerous administration expenses, which were reimbursed from the estate funds. The respondents, her brothers, compelled her to pass her accounts and filed over 300 objections, alleging mismanagement and fraud. However,

³⁹ *Adam v Adam*, 2023 ONSC 3093 (CanLII), at [para 1,2 & 3](#)

⁴⁰ *Adam v Adam*, 2023 ONSC 3093 (CanLII), at [para 33](#)

⁴¹ *Adam v Adam*, 2023 ONSC 3093 (CanLII), at [para 45](#)

⁴² *Adam v Adam*, 2023 ONSC 3093 (CanLII), at [para 26, 27, 28 & 29](#)

they later withdrew more than half of their objections, and only five were upheld by the court.⁴³ The remaining objections lacked sufficient evidence.

The applicant sought substantial indemnity costs of \$390,602.98⁴⁴, while the court ultimately ordered the respondents to personally pay \$325,000 to the applicant for her legal costs. The court deducted certain amounts for unnecessary costs and partial success in the proceedings but emphasized the reprehensible nature of unsubstantiated allegations of fraud.⁴⁵

The case is significant in illustrating the financial consequences of baseless accusations in estate disputes. The court emphasized that the respondents' aggressive actions, which led to costly and complex proceedings, warranted a strong deterrent in the form of a substantial indemnity costs award.

Moore v. McLean, 2022 ONSC 295

Moore v. McLean, 2022 ONSC 295, was an ongoing matter involving the court addressed the removal of Gregory McLean as attorney under power of attorney for property granted by Donald Thomas Moore (Don) due to his failure to provide timely and adequately organized accounts. The court had previously ordered Greg to submit proper financial accounts, and despite multiple opportunities, Greg repeatedly submitted incomplete and disorganized documents. His accounts lacked proper formatting, supporting receipts, and clear organization, which are necessary for transparent financial reporting.

The matter involved Don's financial affairs from August 2019 to January 2022. While the court did not find evidence that Greg had misappropriated or squandered Don's assets, his inability to produce satisfactory financial records raised significant concerns. Despite Greg's failure to meet the court's expectations for providing proper accounts, the court

⁴³ *Toller James Montague Cranston* (Estate of), 2021 ONSC 3704 (CanLII), [at para 9](#)

⁴⁴ *Toller James Montague Cranston* (Estate of), 2021 ONSC 3704 (CanLII), [at para 5](#)

⁴⁵ *Toller James Montague Cranston* (Estate of), 2021 ONSC 3704 (CanLII), [at para 31](#)

passed his accounts for the periods of August 2019 to July 2020 and August 2020 to July 2021.⁴⁶

In its decision, the court emphasized the importance of form and transparency in passing accounts, noting that the fiduciary's role is to "show their work" to both the court and interested parties. However, in this instance, the court characterized Greg's disorganization as a "badge of disorganization" rather than fraud, recognizing that while he failed to meet procedural requirements, his actions did not rise to the level of intentional wrongdoing.⁴⁷

Ultimately, the court passed Greg's accounts but removed him as attorney, allowing for the smooth transition of Don's financial affairs to Kathleen, the applicant. This case underscores the fiduciary's obligation to maintain clear and accessible financial records, and that failure to do so can lead to removal, even absent evidence of fraud.⁴⁸

Picone v. Mossetti, 2023 ONSC 1038

In *Picone*, a mother had appointed her son, Ernie (the "Respondent") as her attorney under a power of attorney and estate trustee. Ernie's brother, Frances (the "Applicant") was a beneficiary of the mother's estate who claimed that the Respondent had misappropriated \$342,759 from his mother through mortgage payments of her house and an additional \$378,109 from the sale of the house. The Respondent claimed they were gifts from his mother, and a fee for acting as her attorney for property.⁴⁹

The Respondent failed to prove that such sums of money were gifted to him by his mother. For this reason, the court found in favour of the Applicant, stating that the Respondent

⁴⁶ *Moore v. McLean*, 2022 ONSC 295 (CanLII), at [para 5 & 6](#)

⁴⁷ *Moore v. McLean*, 2022 ONSC 295 (CanLII), at [para 26](#)

⁴⁸ *Moore v. McLean*, 2022 ONSC 295 (CanLII), at [para 33 & 34](#)

⁴⁹ *Picone v. Mossetti*, 2023 ONSC 1038 (CanLII), at [para 2](#)

had breached his fiduciary duty as attorney for property after he withdrew money from his mother's accounts for his own benefit and use. The court ordered the Respondent to pay back a total of \$720,779.12, which were divided between the Applicant and their mother's estate.⁵⁰

***Marttunen v McDevitt*, 2023 ONSC 208**

The decision in *Marttunen v McDevitt*⁵¹ concerns the conduct of the Respondent while acting under a Power of Attorney for property for his mother who was diagnosed with dementia in 2018. The Applicant was made a co-attorney, however, denies knowing she was granted such authority at that time. In 2022, the Applicant commenced the within application seeking, amongst other things, an order that the Respondent be required to pass his accounts for actions taken in his capacity as Attorney for Property of his mother.

At all material times, the Respondent was living in Alberta, and his mother was living in Thunder Bay. The mother did not own a computer, had no knowledge of internet banking, and since her dementia diagnosis, had not been able to use an ATM (as she is unable to remember passwords).

In July 2021, the mother had a bad fall and was admitted to Hospital. This led the Applicant to take a closer look at her finances. The Applicant discovered suspicious transactions in the amount of \$425,000.00, occurring between February 2015 and December 2021. Several of the transactions occurred in Fort Saskatchewan, Alberta. The Respondent had lived in Fort Saskatchewan and there was no evidence the mother had ever visited him there.

The Respondent made attempts to explain the misappropriation through his affidavit. The court found he was candid in these materials, admitting that he took \$412,308.50 by way of cash withdrawals and internet banking transfers from the joint account he held with his mother. There was also an amount of \$31,665.54 which was noted as "undetermined" but

⁵⁰ *Picone v. Mossetti*, [2023 ONSC 1038](#)

⁵¹ *Marttunen v. McDevitt*, [2023 ONSC 208](#)

were the Respondent's responsibility to protect for his mother. He did not assert the funds were his in the first place. He admitted his mother said the funds were not a gift. He admitted he took the money for his own benefit. He admitted he did not tell her what he was doing nor discussed it with her in any way. He described his actions as power of attorney as being "unfaithful". He asked for forgiveness for what he did.

The court concluded that the Respondent held the sum of \$443,974.04 on a resulting trust for his mother. The court applied a number of equitable remedies in this case, including:

Ordering and declaring that any assets or funds held jointly between the Respondent and his mother are held in trust by the Respondent for the benefit of the mother and that the Respondent shall forthwith transfer or convey any funds or assets held jointly or in trust for the mother.

Public Guardian and Trustee v Cherneyko et al, 2021 ONSC 107

The decision in *Public Guardian and Trustee v Cherneyko et al.*⁵² concerns the conduct of a neighbour who took advantage of a vulnerable older adult. Her conduct and the misappropriation of the older adult's property were discovered as the result of an investigation conducted by the Office of the Public Guardian and Trustee.

Ms. Jean Cherneyko ("Jean") was at the time a 90-year-old senior with cognitive impairments and a diagnosis of dementia. Prior to her admission to long-term care, Jean lived alone in her Thunder Bay home where she grew close to her neighbor, the Respondent, Kristina Munson ("Tina"). In 2019, Jean appointed Tina as her attorney for property and personal care. On August 27, 2019, Tina and Jean appeared at a Thunder Bay CIBC branch where Jean transferred \$250,000 to Tina. Four days later, Jean was admitted to Thunder Bay Regional Health Sciences Centre due to acute delirium and progressive cognitive decline. She was admitted to a long-term care facility on October

⁵² *Public Guardian and Trustee v. Cherneyko et al*, [2021 ONSC 107](#)

1, 2019. In March 2020, CIBC froze Jean’s accounts. This led to the PGT opening an investigation.

The agreed facts establish that during her lifetime, Jean was a person who was always careful with her money. By age 89, she had accumulated cash or easily cashable assets totaling over \$1 million exclusive of her real property.

The court in *Cherneyko*, pursuant to the SCC decision in *Pecore v. Pecore* held that Tina failed to rebut the presumption of a resulting trust with respect to the alleged gift to her of \$250,000. What’s more, Jean’s power of attorney for property was instructive in that paragraph 9 noted that no individual acting as one of her attorneys shall be entitled to charge or be paid compensation. As a result, it was held that Tina breached her fiduciary duty. She was ordered to pay Jean the sum of \$334,289.65 comprised of:

- (a) \$250,000 not proven “gift”;
- (b) \$70,573.06 not proven as “gifts”; and,
- (c) \$13,716.59 unknown expenses.

Carey v. Carey, 2018 ONSC 4564

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

In this case, the older adult mother suffered from dementia and had two capacity assessors agree in their findings that she was incapable of managing both her property and person ⁵³ Additionally, the mother’s lawyer also concluded that she was incapable of providing instructing.

The mother had seven adult children, all of whom were over their mother’s care and what was to be in her “best interests”, including questions surrounding where she should live.

⁵³ *Carey v Carey*, [2018 ONSC 4564](#). Appeal to Court of Appeal for Ontario quashed on the basis that the order appealed from was interlocutory: *Carey v Carey* 2019 ONCA 144. Further and final reasons for judgment made in *Carey v Carey*, 2019 ONSC 2616.

There were also allegations of elder and financial abuse. The mother was being shuttled between the two homes of her attorneys under a Power of Attorney document, that of her son, Arthur, and her other son, Douglas.

There were disputes on when the mother could have contact with her other five children. The other siblings made allegations of elder abuse and called the police to pay a number of “wellness” visits on their mother. The police visited the mother multiple times and confirmed her well-being. At no time did the police officers report any concerns. Neither did the mother’s treating doctor or dentist.

One of the main questions for the court to consider was whether the two attorney sons should be removed as attorneys. The court concluded that there was strong and compelling evidence of misconduct and/or neglect by Arthur (who worked in concert with Douglas), that included:

- Arthur having failed to adequately explain how he spent all of his mother’s \$42,000 per year pension income when she had no independent expenses such as housing costs, car, etc.;
- Arthur having failed to adequately account for how increased mortgage funds were utilized;
- Arthur and Douglas having failed to obey a number of court orders requiring disclosure;
- there being credible evidence regarding the mother’s missing jewelry and that Arthur pawned it;
- at the very least, that the attorneys had “shown little skill in using [the mother’s] funds in a responsible manner to secure her financial best interests”;
- whatever Arthur may have done or neglected to have done, and that Douglas had failed to step in; and
- Arthur and Douglas having failed in their duties to foster regular contact between the mother and her other children.

Ultimately, the court found that the two-part test as set out in the case of *Schaefer's Estate*⁵⁴, that (1) there must be strong and compelling evidence of misconduct or neglect and (2) that the court must consider whether the best interests of an incapable person are being served, had been met and accordingly removed the Arthur from his role as attorney and Douglas from his role as alternate.

McMaster v. McMaster, 2013 ONSC 1115

In one rather sad case, a mother appointed her two adult sons as joint attorneys under a CPOAP.⁵⁵ However, she either decided not to inform one of them, or forgot to tell him, that he was appointed as her attorney.

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, including a go-kart business. By the time the other son figured it out what had happened, the mother's assets were depleted by almost \$2,000,000.

The court removed the "knowing son" as attorney and ordered that he provide an accounting for the money he had taken and/or used. The court also had this to say:

[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.

⁵⁴ *Teffer v Schaefer's*, [\(2008\) 93 OR \(3d\) 447 \(ONSC\)](#)

⁵⁵ *McMaster v McMaster*, [2013 ONSC 1115](#), Costs Decision 2014 ONSC 2545.

Servello v. Servello, 2015 ONCA 434

In this case, shortly after his father's death, a son took his mother to a registry office and, with the assistance of a conveyancer, transferred the title to his mother's house to himself and his mother as joint tenants.⁵⁶

The mother thought that she was attending the courthouse 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 Power of Attorney document). Also, the son was living with the mother at this time, and she was relying more-and-more on him after her husband's death. To add insult to injury, not only was the mother grieving the loss of her husband, but her first language was Italian and her comprehension and reading in English was limited, thus ensuring that she did not understand the documents she was signing.

Three years later, the mother attended the registry office with one of her daughters and had a title search completed on her house. This was the first time that she became aware that her son had acquired a right of survivorship in her home. The son refused to restore title to the property to his mother. Accordingly, the mother 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. [The mother] did not receive independent legal advice, and accordingly the two deeds which gave [the son] an interest in the land should be set aside on this basis as well.”

⁵⁶ *Servello v Servello*, [2015 ONCA 434](#)

The transfer was set aside 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.

Zimmerman v. McMichael Estate, 2010 ONSC 2947

In this case, a deceased husband and his surviving wife were founders of an extensive Canadian art collection, the McMichael Collection, donated to the province of Ontario.⁵⁷ Both husband and wife had Wills that left their entire estate to the surviving spouse and, should there be 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 former crown prosecutor, took the widow, Mrs. McMichael, who was 81 years old 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 had 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, as her attorney for property, Mr. Zimmerman had full control over all of her assets.

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

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

⁵⁷ *Zimmerman v McMichael Estate*, [2010 ONSC 2947](#).

also found that he had used Mrs. McMichael's BMW, charging 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 CDN and over \$85,000 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 so it is unknown if the money was ever recovered.

Provincial/Territorial Legislation across Canada

Besides the remedies provided for by the *Criminal Code*, each province and territory has created their own legislation in response to elder abuse and neglect. Generally, the following different types of provincial legislation may apply to the 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 the definition of an "adult in need of protection". These include British Columbia,⁵⁸ the

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

Yukon,⁵⁹ Prince Edward Island,⁶⁰ and New Brunswick.⁶¹ With British Columbia, the Yukon and Prince Edward Island having established by regulation designated agencies that investigate and respond to situations of an adult needing protection, although there is no duty to report.

In British Columbia, the *Adult Guardianship Act*, provides protection to vulnerable older adults who experience abuse and neglect in the province. Particularly, Part 3 of the *Adult Guardianship Act* provides provisions with respect to support and assistance for abused and neglected adults. Among other things, the *Adult Guardianship Act* establishes a legal framework for reporting abuse or neglect to a designated agency in the province and gives those agencies the powers to respond to reports of abuse, as necessary, including authority to investigate and take steps to protect the individual. There is also other legislation available in the province to assist designated agencies in fulfilling their mandate through various other mechanisms, for example: the *Mental Health Act*⁶²; the *Representation Agreement Act*; the *Health Care (Consent) and Care Facility (Admission) Act*⁶³; the *Patients Property Act*; and the *Enduring Power of Attorney Act*⁶⁴.

Nova Scotia is the only jurisdiction in Canada that has a mandatory reporting regime for the abuse of older adults with this duty applying in limited circumstances under the *Adult Protection Act*⁶⁵. In Newfoundland and Labrador, there is a general duty on everyone to report neglect. However, the duties 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.

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 *Mental Health Act*, RSBC 1996, Chapter 288.

⁶³ *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, Chapter 181.

⁶⁴ *Enduring Power of Attorney Act*, RSBC 1996, Chapter 370.

⁶⁵ *Adult Protection Act*, RSNS 1989, c.2.

In British Columbia,⁶⁶ Alberta,⁶⁷ Manitoba,⁶⁸ Ontario,⁶⁹ and Nova Scotia⁷⁰ 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 has some power to intervene in circumstances of financial abuse or abuse by an attorney under a power of attorney, guardian, trustee, or other substitute decision maker, but no corresponding duty to report. Notably that in the Yukon,⁷¹ British Columbia,⁷² Alberta,⁷³ Saskatchewan,⁷⁴ Ontario,⁷⁵ and Quebec⁷⁶ the Public Guardian and Trustee has the power to investigate abuse.

Like the *Criminal Code*, provincial and territorial legislation are essentially age neutral, meaning there are no laws that apply exclusively to older people, and that the laws were made to protect people at risk, generally.

4. CRIMINAL REMEDIES

The *Criminal Code* plays an important role in protecting older adults from financial abuse and exploitation. Select criminal offences can be particularly useful in deterring and penalizing perpetrators of financial abuse.

⁶⁶ *Community Care and Assisted Living Residential Care Regulation*, BC Reg 96/2009 Sched. D.

⁶⁷ *Protection for Persons in Care Act*, SA, 2009 C.P-29.1.

⁶⁸ *The Protection for Persons in Care Act*, CCSM, c P144.

⁶⁹ *Long-Term Care Homes Act*, SO 2007, c 8.

⁷⁰ *Protection for Persons in Care Act*, SNS 2004 c 33.

⁷¹ *Public Guardian and Trustee Act*, SY 2003, c 21, Sch C, Part 2, s. 9(1)

⁷² *Public Guardian and Trustee Act*, RSBC 1996, c 383, s.17

⁷³ *Adult Guardianship and Trusteeship Act*, SA 2008, cA-4.2, ss. 75 – 77.

⁷⁴ *The Public Guardian and Trustee Act*, SS 1983, c P-36.3, s. 40.7.

⁷⁵ *Supra*, note 21 *Substitute Decisions Act*, 1992, s. 27.

⁷⁶ *Public Curator Act*, RSQ, c C-81.

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

CRIMINAL CODE OFFENCES AND THE "CRIME" OF ELDER ABUSE

- ❖ Section 215: failing to provide the necessities of life (i.e., criminal neglect)
- ❖ Section 220: causing death by criminal negligence (i.e., where neglect leads to death of older adult)
- ❖ Section 264.1: uttering threats
- ❖ Sections 265 and 266: physical assault
- ❖ section 271: sexual assault
- ❖ Section 279: unlawful confinement
- ❖ Section 322: theft
- ❖ Section 331: theft by a person holding power of attorney
- ❖ Section 336: criminal breach of trust (i.e., conversion by trustee)
- ❖ Section 342: theft or forgery of a credit card
- ❖ Section 346: extortion
- ❖ Section 366: forgery
- ❖ Sections 386 – 388: fraud
- ❖ Section 423: intimidation

Notably, section 718 of the *Criminal Code*, being a sentencing provision introduced in 2013, provides our courts with additional factors that can be considered to increase the severity of sentencing, such as where the victims of these crimes are older and vulnerable. Furthermore, section 718 references a wide range of aggravating factors that can be considered by the court in determining appropriate sentencing principles. For example, 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*⁷⁷ came into force. This Bill 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, and providing a current photo of the offender prior to release.

Court Decisions Highlighting Criminal Remedies: 2010 – 2024

R. v. Wentworth - 2023 – Kingston, ON

Offences: s. 234 (Manslaughter); s. 343 (Robbery).

On June 2, 1995, 92-year-old Henrietta Knight was bound to a chair and beaten in the head in her small home in Kingston, where she lived alone. She was taken to the hospital and released the same day, but returned on July 1, 1995, showing signs of confusion. She was released on July 3rd and returned again on July 11 with bleeding on her brain. She remained in hospital and was eventually transferred to a chronic care facility where she sadly died on November 4, 1995.⁷⁸

Were it not for a sworn videotaped statement Ms. Knight made to police three days after the attack, it might have been impossible to apprehend and convict her assailant. Over

⁷⁷ *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

⁷⁸ *R. v. Wentworth*, 2022 ONSC 5319 at [paras. 4-5](#)

the course of her 33-minute interview, Ms. Knight described the attack and provided a detailed description of her assailant.⁷⁹ Nearly 27 years later, Mr. Wentworth was charged with robbery and manslaughter. The evidence presented at trial included photographs of Ms. Knight and her home following the invasion. The photographs revealed extensive bruising to her face, neck, shoulders, arms and hands. Some of Ms. Knight's skin had been torn off her arms where the accused taped her up. The photographs of her home revealed that it was ransacked while another photograph showed a chair with tape attached. The tape from the chair was analyzed and revealed to have samples of DNA consistent with Ms. Knight's.⁸⁰

The court was unable to conclude based on the evidence available that Ms. Knight either died because the assaults produced the conditions that caused her death, or because the assault left her more vulnerable to death because of age-related decline or a pre-existing condition.⁸¹

In concluding that Mr. Wentworth was guilty of the robbery but not the manslaughter of Ms. Knight, Justice Lacelle held that:

One could much more easily reach a conclusion that Ms. Knight probably died because the accused either caused her death or because his conduct left her vulnerable to a hastened decline from other health issues. But proving something is probable is not enough to satisfy the burden that the Crown bears. More is required in a criminal trial in order to rebut the presumption of innocence.⁸² Mr. Wentworth received a 12-year sentence for this robbery. However, he was also found guilty of the two unrelated murders of Richard Kimball in 1995 and Stephen St. Denis in 2001 and of robbing a TD Bank branch in Kingston in 1995 and a 2000 car bombing in Toronto that damaged homes and vehicles.

⁷⁹ *R. v. Wentworth*, 2022 ONSC 5319 at [paras. 36-42](#)

⁸⁰ *R. v. Wentworth*, 2022 ONSC 5319 [at para 9](#)

⁸¹ *R. v. Wentworth*, 2023 ONSC 1165 at [para 395](#)

⁸² *R. v. Wentworth*, 2023 ONSC 1165 at [para 396](#)

R v Cvetas, 2022 ONSC 1640
s. 322. (1) (Theft Over \$5,000)

In *R v Cvetas*,⁸³ banking executive Nick Cvetas (“**Mr. Cvetas**”) entered a guilty plea on September 1, 2021, for the charge of theft over \$5,000. Mr. Cvetas admitted to taking \$317,000 over the course of a year from the account of his 81-year-old godmother, Nevenka Cemas (“**Ms. Cemas**”).⁸⁴

In the preceding years, Ms. Cemas lost her family and grew close to Mr. Cvetas. In 2014, Ms. Cemas added Mr. Cvetas as a joint account holder on one of her bank accounts and updated her will, appointing Mr. Cvetas as Executor and Trustee of her estate, leaving the residue of her estate to him as well. In early 2015, Mr. Cvetas was appointed as attorney under a power of attorney for property and personal care for Ms. Cemas.

At the time the offences occurred, Mr. Cvetas was employed as an executive at the Bank of Montreal, earning about \$160,000 to \$170,000 a year. His wife was also employed. However, by late 2015, Mr. Cvetas found himself in a precarious financial state. On December 1, 2015, he withdrew \$35,000 from Ms. Cemas’ account and deposited the funds into his own. On February 5, 2016, he withdrew \$260,000 from her account. When a bank employee inquired, he responded that “he was moving the money to BMO Nesbitt Burns to get a higher interest rate deposited on account.” On August 11, 2016, he withdrew \$15,000, and on October 26, 2016, \$7,000 for a total of \$317,000. During this same period, Ms. Cemas only made three withdrawals for a total of \$2,000.00.

In November of 2016, Ms. Cemas discovered there were insufficient funds in her account. She became distraught and called Mr. Cvetas who explained to her that the money was safe and had been invested and apologized for not telling her. By February 2017, with no

⁸³ *R. v. Cvetas*, [2022 ONSC 1640](#)

⁸⁴ *R. v. Cvetas*, 2022 ONSC 1640, [at para 1](#)

money available to her, Ms. Cemas contacted a lawyer. Mr. Cvetas gave the same investment lie to the lawyer, so the police were contacted.

On October 11, 2017, Mr. Cvetas was arrested and charged after turning himself in to police. Prior to sentencing, he made restitution of \$317,000 to Ms. Cemas through his lawyer.

While Mr. Cvetas was well-supported by a large amount of character letters (33 in total), the Court found their value was limited because many of the writers were unaware that Mr. Cvetas had been convicted for theft. The Court did, however, place emphasis on significant aggravating factors regarding the circumstances of the offence including the amount of money stolen over a period of 10 months, the lies and dishonesty, and the planning, but most importantly, the fact that “He abused the trust of a vulnerable person,” resulting in a breach of trust under a power of attorney and in the relationship between godson/godmother.

In determining an appropriate sentence, the Court held that, “the most important objectives in sentencing an offender who has abused a position of trust are denunciation and general deterrence.”⁸⁵ The appropriate sentence the Court concluded, had to be one that accords with the principle of parity which demands a similar sentence imposed on similar offenders for similar offences in similar circumstances. To this end, the Court looked at several decisions in reaching its decision to sentence Mr. Cvetas to 12 months imprisonment, two-years probation with statutory conditions and with a condition prohibiting him from contacting Ms. Cemas. The Court also “imposed an order that limits Mr. Cvetas from having authority over the real property, money or valuable security, of another person except in the capacity of an employee of volunteer under the supervision of another adult, or for an immediate family member, for a period of five years.”⁸⁶

⁸⁵ *R. v. Cvetas*, 2022 ONSC 1640, [at para 40](#)

⁸⁶ *R. v. Cvetas*, 2022 ONSC 1640, at [para 60](#)

R v Riasyk, 2021 ONSC 5981**s. 334 (Theft over \$5,000); s. 362(1)(a) (Theft by False Pretenses)**

In *R v Riasyk*, Mr. Daniel Riasyk was convicted under section 334 (Theft over \$5,000) and section 362(1)(a) (Theft by False Pretenses) after exploiting his father, Ivan Riasyk, who suffered from dementia and resided in a long-term care facility. As the named Power of Attorney for both property and personal care since 2013, Mr. Riasyk was responsible for managing his father's finances, which included pension income and proceeds from the sale of his father's home. Instead, Mr. Riasyk systematically drained his father's accounts, taking over \$219,533.53 for personal use, primarily to fuel his drug addiction.⁸⁷

The theft was discovered when the care facility contacted Mr. Riasyk's sister, Juliana, regarding unpaid fees, prompting an investigation that revealed the depletion of the father's bank account, leaving only \$1.00. As per the aggravating factors, Mr. Riasyk did a serious breach of trust, he was named attorney under power of attorney for property and personal care of his father. It was an abuse of a vulnerable person as set out in s. 718.04 of the Criminal Code. Not only was Mr. Riasyk elderly but he also suffered from dementia. His medical condition made it such that he could not manage his personal financial affairs. It was an abuse of a vulnerable person as set out in section 718.04 of the Criminal Code. The court found that Mr. Riasyk's actions represented a gross abuse of trust, particularly given the victim's cognitive impairments and complete dependence on his son. His failure to pay for his father's care, while spending the money on his addiction, significantly harmed his father's welfare. Mr. Riasyk was sentenced to eight months of imprisonment for theft and then 16 months of house arrest for the offence of false pretenses. He was also ordered to pay restitution to his father's care facility.⁸⁸

R v Cole, 2021 ONCA 759**s. 331(Theft); s. 235(First degree murder)**

⁸⁷ *R. v. Riasyk*, 2021 ONSC 5981 (CanLII), [at paras 1 - 6](#)

⁸⁸ *R. v. Riasyk*, 2021 ONSC 5981 (CanLII), [at para 21](#)

In *R v Cole*, Margaret Lee Cole was convicted of first-degree murder under section 235 of the Criminal Code for killing 82-year-old Richard Humble, an elderly man whom she had financially exploited before his death.⁸⁹ Ms. Cole, who presented herself as Mr. Humble's Power of Attorney, stole \$65,000 from him using forged cheques and fraudulent documents.⁹⁰ The court heard evidence that she had also drugged Mr. Humble with Alprazolam, a sedative prescribed to her, before setting his house on fire. Toxicology reports confirmed that Mr. Humble had an unprescribed sedative drug in his system at the time of his death.⁹¹

Further forensic analysis revealed that the Power of Attorney documents were fraudulent, filled out by Ms. Cole after Mr. Humble's death. Her efforts to fabricate a will and create a false alibi were ultimately uncovered. The court found her financial motive and the premeditated nature of the crime particularly egregious, as she had planned the murder to gain access to Mr. Humble's assets. Ms. Cole was sentenced to life imprisonment, with no possibility of parole for 25 years.⁹²

***R v Banoub*, 2019 ONCJ 68**

s. 322 (Theft), s. 334 (Punishment for Theft over \$5,000)

In this case, a daughter pled guilty to theft over \$5,000 for depleting her mother's bank accounts and investments by approximately \$161,000 in four years.⁹³ While her mother was in a long-term care home, the daughter, who was appointed as her mother's attorney pursuant to a Power of Attorney document, used her position of power to make consistent withdrawals and advances from her mother's accounts for her own personal benefit. She spent the money on things such as gambling, living expenses, and an overseas trip. What's worse was that, in doing so, she ceased paying her mother's long-term care home

⁸⁹ *R. v. Cole*, 2021 ONCA 759 (CanLII), [at para 1](#)

⁹⁰ *R. v. Cole*, 2021 ONCA 759 (CanLII), [at para 24](#)

⁹¹ *R. v. Cole*, 2021 ONCA 759 (CanLII), [at para 8](#)

⁹² *R. v. Cole*, 2021 ONCA 759 (CanLII), [at para 5](#)

⁹³ *R v Banoub*, [2019 ONCJ 681](#).

costs. Exacerbating these actions was the fact that the daughter offered “no reason” as to why she did these things.

In sentencing the offender to six months imprisonment, followed by three years probation, the Court held:

The most aggravating factor is that instead of taking care of her mother, she took advantage of her. She treated her mother's money, which was entrusted to her on a fiduciary basis, as if it were her own... She took this money despite having been gifted \$288,000 following the sale of her mother's house...It is... an aggravating factor that this gift was not enough to satisfy her greed. Instead, she stole the rest of her mother's assets. In the process she put her mother at risk of being denied the same level of services which she had been receiving at the long-term care facility.⁹⁴

The Court was satisfied that the offence was of such gravity that no sentence other than imprisonment of at least six months would be appropriate in this case.

R v Saucier, 2019 ONSC 3611

s. 380(1) (Fraud over \$5,000), ss. 368(1) and 366(1) (Forgery, use, trafficking or possession of forged document)

In this case, a financial advisor stole (i.e., defrauded and misused funds) from his elderly retired clients over a period of three years.⁹⁵ In doing so he forged and used forged documents. His clients paid him money expecting that it would be used for their life insurance premiums. Instead, he deposited the stolen money into two bank accounts that he controlled. Ultimately, however, when his clients asked for their money back, all of the money was repaid to the clients.

The offender was found guilty of 10 counts of fraud over \$5,000, 4 counts of use, trafficking or possession of forged documents and 1 count of forgery.

⁹⁴ *Ibid*, *R v Banoub* at [paras 87-92](#).

⁹⁵ *R v Saucier*, [2019 ONSC 3611](#).

In the sentencing decision, the court noted that all of the funds had been returned to the victims. However, the victims had been impacted in other ways with trust issues and emotional impact. The court also noted that:

many of the victims were vulnerable by reason of their age, relative lack of sophistication in financial matters, or because of their personal circumstances at the time the offences were committed. Many of the victims were of relatively modest means. ...some also needed the accused to translate documents and make out their cheques because of language and literacy issues...⁹⁶

The offender was sentenced to 15 months in jail.

R v Klimitz, 2018 ONCA 553

Trial decision – Convicted of theft and fraud; Appealed - Dismissed

In *R v Klimitz*, the accused was initially convicted of Theft and Fraud and had a sentence of three years of custody imposed on him along with a restitution order of \$125,000 during the trial, after stealing over \$200,000 from his elderly mother's retirement savings. The appellant appealed against both conviction and sentence. Over two and a half years, Mr. Klimitz, who was entrusted with managing his mother's finances, engaged in repeated fraudulent transactions that reduced her savings from \$557,000 to just \$83.43. The fraud came to light when his mother was evicted from her retirement home for being five months behind on rent—unbeknownst to her, as Mr. Klimitz had concealed the transactions. The victim was left utterly embarrassed and humiliated and tried to pay the debts to the retirement home herself using her meagre pension income but failed to do so.⁹⁷

The court underscored the prolonged and calculated nature of the fraud, noting that the accused engaged in over 80 fraudulent transactions, systematically draining his mother's funds. His actions left her without adequate resources for her care, shifting the financial burden to her other children. The trial judge emphasized the seriousness of breaching a

⁹⁶ *Ibid*, at [para 15](#).

⁹⁷ *R. v. Klimitz, 2018 ONCA 553* (CanLII), at [para 1 & 3](#)

fiduciary relationship with an elderly parent, particularly when it leads to significant financial and emotional harm, as noticed in this case. Mr. Klimitz was sentenced to three years in prison and was ordered to pay restitution of \$125,000. ⁹⁸

R v Fernandez, 2018 ONSC 7784

s. 267 (b) (Assault causing bodily harm)

In this case, the offender was a personal support worker at a long-term care facility who punched a 97-year-old woman causing severe bruising.⁹⁹ He was found guilty of assault causing bodily harm. Initially, the offender denied, but later admitted to, committing the offence. In his presentence report he stated that: “*My initial dishonesty turned to a ball of lies that snowballed out of control, and I was too scared and embarrassed to turn things back.*” He apologized to the victim and her family.

The court noted that “*this is a case of what is sometimes referred to as ‘elder abuse’, that is, abuse of an elderly person by his or her caregiver. I agree with Crown counsel that the principles of deterrence and denunciation are of particular importance in such cases.*” Fernandez was sentenced to a term of imprisonment for six months, to be served in the community (i.e., with conditions, remain in his house, not be in contact with anyone over 65, etc.) and probation.

R v Curreri, 2016 ONSC 3598

s. 380(1)(a) (Fraud over \$5,000)

In this case, an adult son was charged under section 380(1)(a) of the *Criminal Code* for committing fraud over \$5,000 against his 96-year-old father.¹⁰⁰ 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

⁹⁸ *R. v. Klimitz*, 2018 ONCA 553 (CanLII), at [para 11](#)

⁹⁹ *R v Fernandez*, [2018 ONSC 272](#).

¹⁰⁰ *R v Curreri*, [2016 ONSC 3598](#).

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, and both were sentenced to two years less a day to be served in the community (i.e., house arrest). The son was also ordered to pay restitution.¹⁰¹ The Law Society of Ontario also disciplined the lawyer acting on the transaction for being duped by the son and the assistant. The lawyer admitted to professional misconduct and was fined \$25,000.

***R v Bruyns*, 2016 ONCJ 527**

s. 322 (Theft), s. 380(1) (a) (Fraud over \$5,000), and s. 336 (Criminal Breach of Trust)

In this case, a daughter was charged with three offences.¹⁰² The first two charges alleged that, being entrusted with her father's Power of Attorney for Property, she (1) stole money exceeding \$5,000, and (2) defrauded him of money exceeding \$5,000. The third charge alleged 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 of the *Criminal Code*. It should be noted that it is not clear from the caselaw as to why she was not charged under section 331, being Theft by a Person Holding a Power of Attorney.

The daughter had used her father's money to pay her own personal bills that caused him to default on payments to his long-term care facility where he was residing. That facility took no steps against him 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 Power of Attorney document had a clause that stated:

¹⁰¹ *R v Curreri*, [2017 ONSC 5652](#).

¹⁰² *R v Bruyns*, [2016 ONCJ 207](#).

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. Additionally, past loans 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.

Furthermore, the court agreed with the Crown’s argument that the daughter had breached her fiduciary and statutory duties under sections 32 and 66 of the *Substitute Decisions Act, 1992*. The court found that the Crown had proven beyond a reasonable doubt all of the essential elements of the charged offences. Accordingly, the daughter was found guilty of theft and fraud *under* \$5,000,¹⁰³ and guilty of criminal breach of trust.

She was sentenced to a suspended sentence with probation for 18 months, and the terms of her probation required that she could no longer act as her father’s attorney.

R v Hooyer, 2016 ONCA 44

s. 331 (Theft by Person Holding a Power of Attorney) and s. 380 (Fraud)

In this case, a long-time family friend of an older adult couple was charged and convicted of theft and fraud contrary to sections 331 and 380, being theft by person holding a power of attorney and fraud, respectively.¹⁰⁴

¹⁰³ Note that the Crown was unable to prove the stolen quantum as being *over* \$5,000, resulting in an adjustment to the offences being those *under* \$5,000.

¹⁰⁴ *R v Hooyer*, [2016 ONCA 44](#).

The offender had helped the couple with, among other things, chores around the house and driving them to appointments. Ultimately, the husband developed dementia and was moved into long term care facility with his wife as his attorney for property until she died. The offender was the alternate attorney for property and named residual beneficiary in the couple's Wills.

After the wife died, the offender assumed control over the husband's property under the Power of Attorney document. Over the course of 7 years, he moved into their home, purchased a \$37,000 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 husband's long-term care facility and bank called the police, the husband was left with \$18 in his bank account, \$13,000 in back taxes on his home and \$16,000 owing to the facility. In total, the offender stole \$378,552.67 of the husband's assets and investments. He also defrauded Veteran's Affairs Canada (VAC) of over \$2,000 as he submitted invoices from the facility to VAC claiming partial reimbursement and then kept the money himself.

At trial, the offender argued that no laws were broken because there were no limitations listed on the Power of Attorney document 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 disagreed, explaining that an attorney is a fiduciary with fiduciary duties and obligations, and as such, the offender should have known of his responsibilities. The court found that the offender knew the assets belonged to the husband when he used them for his own benefit.

On the theft charge, the offender was sentenced to 2 years less a day and ordered to pay \$378,552.67 in restitution to the husband's estate, as the husband predeceased the outcome of the trial. On the fraud charge, the offender 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.¹⁰⁵

***R v Davy*, 2015 CanLII 10885**

s. 215 (Failure to Provide Necessaries of Life)

There have been an increasing number of cases dealing with convictions under section 215 of the *Criminal Code*, being the provision for criminal neglect (i.e., failure to provide the necessaries of life). These cases show how neglect and financial abuse can go hand-in-hand, as the abuser(s) 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) is "unable to provide themselves with necessaries of life".¹⁰⁶ As highlighted below, 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.

In this case, the court was faced with a particularly heinous crime.¹⁰⁷ In 2015, a daughter and son-in-law were convicted of failing to provide the necessaries of life to the elderly and vulnerable victim, the daughter's mother. The mother lived with her daughter and son-in-law and suffered from, among other serious medical conditions, severe dementia and was incapable of making decisions for herself, including decisions regarding her personal care.

In response to a call, the police arrived at the offenders' home where they were met with an overpowering smell of cat urine, the presence of filth and feces, and, generally, a home in complete squalor. The police discovered the mother naked on a bare mattress in a

¹⁰⁵ *R v Hooyer*, [2016 ONCA 44](#).

¹⁰⁶ *Supra*, note 19, *Criminal Code*, s. 215(1)(c).

¹⁰⁷ *R v Davy*, [2015 CanLII 10885 \(ON SC\)](#).

room with blacked out windows, covered in her own vomit. It as noted that she looked like a skeleton covered with skin. When examined by health care professionals she was found to be dehydrated, emaciated, anemic, and suffering from internal bleeding and a fractured right hip. She died shortly thereafter at the age of 77.

The daughter and son-in-law had looked after their mother for 8 years and were her attorneys under a Power of Attorney for Personal Care. In their roles, they had refused all help to care for their mother, kept their mother isolated and denied access to those who offered assistance (e.g., community care personnel).

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

In rendering their decision, 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 Taylor*, 2012 ONCA 809**

s. 380 (1) (Fraud)

This case is another notable example of an abuse of trust and an aggravating factor considered in sentencing. In this case,¹⁰⁸ the victim, 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 upon whom she relied for her daily needs. At the caregiver's suggestion, the victim executed a Power of Attorney for Property in the

¹⁰⁸ *R v Taylor*, [2012 ONCA 809](#)

caregiver's favour. The victim also executed a new Will that appointed the caregiver as executor. One year later, the caregiver used the Power of Attorney for Property document to obtain a bank card for the victim's savings account. The caregiver then drained the bank account of \$126,000, leaving only \$17,000 remaining. Note that the caregiver used that money for her own benefit.

The caregiver subsequently left the victim's employ, and when the victim's new caregiver read her bank statements, the new caregiver informed the victim of the discovered suspicious transactions and called the police. The police charged the attorney caregiver with fraud and obtained expert reports confirming that the victim was capable of managing her property throughout the period in question, that included the period of her discussions with police. Unfortunately, the victim died before the trial took place. In her absence, the Crown relied on the victim's witness statements that had been recorded by the police. The judge accepted the Crown's evidence and expert's evidence and sentenced the accused to 21-months in prison.

The attorney caregiver appealed her conviction on the grounds that the victim's recorded statements were hearsay and therefore inadmissible, and that on the basis of mitigating factors the judge 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 Kaziuk, 2011 ONCJ 851

s. 334 (Theft), s. 380 (Fraud), s. 331 (Theft by Person Holding a Power of Attorney)

This case is interesting because although section 331 of the *Criminal Code*, theft by a person holding a power of attorney document, was enacted back in 1984, this case is one of only a few reported decisions in Canada citing section 331 in the context of abuse of older adults. Notably, in this case,¹⁰⁹ the accused was not even charged under section 331, rather, he was charged under the regular theft and fraud provisions. That being said, Justice Baldwin did find "*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 this case are unfortunately becoming more commonplace, and therefore of an increasing societal concern. The accused was the adult son, and only child of, the victim, his mother, a widow who was 88 years old at the time of trial. When her husband died a few years earlier, the mother held assets and property well in excess of \$1,000,000, 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 and, subsequently, defaulted on those mortgages. The victim lost everything.

The Crown sought a total sentence of only 3 – 4 years' incarceration. However, Justice Baldwin sentenced the son to the maximum 10-year sentence for theft over \$5,000 and ordered a concurrent 10-year sentence for fraud. Justice Baldwin 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. ...[the son] 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.

¹⁰⁹ *R v Kaizuk, 2011 ONCJ 851.*

The son appealed, and on appeal the Court of Appeal upheld the conviction, but determined that the sentence “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.”¹¹⁰ Accordingly, the Court of Appeal 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.” The son sought leave to appeal to the Supreme Court of Canada but was denied.¹¹¹

5. SCAMS

The rise of digital technology along with bringing convenience and connectivity, has also exposed several vulnerable populations, especially seniors to increasingly sophisticated fraud schemes. In Ontario, financial scams targeting the elderly have become alarmingly prevalent, often leaving victims not only financially devastated but also emotionally distressed. As elder law continues to evolve, it is crucial for legal professionals working in elder law and families to be aware of both the growing risks and the legal remedies available to protect vulnerable seniors from exploitation.

a) The Grandparent Scam

The grandparent scam is a form of social engineering where fraudsters exploit seniors' emotions by pretending to be their grandchild who is in trouble or they typically also impersonate police officers, claiming the grandchild has been in an accident, a medical

¹¹⁰ *R v Kaziuk*, [2013 ONCA 217](#).

¹¹¹ *R v Kaziuk*, [2013 CanLII 64666 \(SCC\)](#).

emergency or is involved in a crime and needs their immediate assistance.^{112 113} They then pressure the victim to withdraw large sums of money or make a wire transfer to "save" their grandchild.

To add credibility, the scammer often uses the real name of the victim's grandchild, obtained from online sources. A newer variation of this scam involves fraudsters sending a ride - sharing service like Uber to pick up the cash in an envelope.

Some of the Warning signs you should look out for would include:

- You receive an unsolicited call claiming a loved one, usually a grandchild, is in immediate danger.
- The caller demands payment in cash, gift cards, or wire transfers.
- The caller refuses to let you hang up or threatens you when you try to verify the information.
- The caller pressures you to act quickly, using intimidation or emotional manipulation.

Canadian Anti-Fraud Centre (CAFC) reported to the total amount of money lost in different types of frauds by victims in 2022 totalled \$530 million; after \$380 million in losses in 2021.¹¹⁴ Out of which over \$9.2 million in losses were reported by seniors who fell victim to such scams. Out of which Ontario had the highest number of reported losses being \$5.4 million, followed by Alberta. However, as per the RCMP, Ontario Provisional Police (OPP) and CAFC, those numbers may only represent five to ten percent of all victims, as many do not report such instances.¹¹⁵

¹¹² Sean Boyton, Global News "Grandparent scams cost seniors over \$9.2M last year", online: Global News <['Grandparent scams' cost seniors over \\$9.2M last year. Here's how to protect yourself - National | Globalnews.ca](#)>

¹¹³ Hari Ravichandram, Identity Guard "Is Your Family Member Really in Danger? It Might Be a Scam", online: <[What Is the Grandparent Scam? How To Identify & Avoid It](#)>

¹¹⁴ Sean Boyton, Global News "*Grandparent scams cost seniors over \$9.2M last year*", online: Global News <['Grandparent scams' cost seniors over \\$9.2M last year. Here's how to protect yourself - National | Globalnews.ca](#)>

¹¹⁵ *Ibid*

Recently another such case was noticed in Ontario where two Ontario women were sentenced to house arrest for trying to get about \$90,000 out of nine elderly Manitoba victims. The scam involved an unknown man calling these seniors pretending to be their grandson who had been arrested and needed money for bail. The two women sentenced were acting as “money mules” and would pick up the cash from these victims' homes.¹¹⁶

b) The Charity Scam

Charity scams involve fraudsters posing as legitimate charities to collect donations. Scammers may approach victims on the street, at their houses, over the phone, or through the internet. Some scammers even go as far as marking collection boxes or emails with the logos of real charities and exploiting recent tragedies or emotional causes, such as helping sick children, disaster relief, etc. to manipulate victims into giving them their money.

Scammers will typically apply high-pressure tactics to secure donations and may refuse to provide any details about the charity, such as their address or contact information.

All legitimate Canadian charities are registered with the Canada Revenue Agency (CRA) and can be verified using the CRA's online charity database at: [Canada Revenue Agency Charity Listings](#).

c) The Bail Scam

In the bail scam, fraudsters contact their targets—often seniors—claiming a loved one has been arrested and requires bail money to be released from custody. The fraudster typically impersonates a police officer and demands money, either through a wire transfer or an in-person handover, to “pay” for the bail.

The RCMP reminds the public that they never solicit funds over the phone. If you receive such a call, do not provide any money or personal details. Hang up and report the scam to your local police and the Canadian Anti-Fraud Centre at 1-888-495-8501.

¹¹⁶ Caitlyn Gowriluk, CBC News “Ontario women get house arrest for role in scamming Manitoba seniors out of nearly \$90K”, online: cbc.ca <[Ontario women get house arrest for role in scamming Manitoba seniors out of nearly \\$90K](#)>

In 2022 alone, the Canadian Anti-Fraud Centre reported more than 90,000 fraud cases. Over 56,000 Canadians were victimized, with losses totalling \$530 million. The bail scam is a growing threat and has been reported in many communities, including Chilliwack.¹¹⁷

d) The Romance Scam

Romance scams typically start on legitimate dating websites, where scammers send messages accompanied by attractive photos, posing as someone seeking a relationship. Once they gain the victim's trust, they begin requesting money, often citing emergencies such as a sick family member or financial hardship.

Once money is sent, the scammer frequently disappears. In 2023, Canadians lost more than \$21 million to romance scams in Ontario alone, while nationwide losses totaled \$50 million in 2021, according to the Canadian Anti-Fraud Centre (CAFC). There is also growing concern about scammers combining romance scams with "pig butchering" investment scams.¹¹⁸

Warning Signs:

- The individual professes love early in the relationship without meeting in person.
- They quickly push to move the conversation to private communication channels like email, text, or messaging apps.
- They always have an excuse for not meeting in person.
- You receive poorly written or oddly phrased messages, sometimes with the wrong name.
- They claim to live nearby but are conveniently working overseas.
- They use guilt or distress to manipulate you into sending money.

¹¹⁷ Sgt. Krista Vrolyk, Royal Canadian Mounted Police "RCMP warn the public about recent bail scam that often targets the elderly", online: B.C Newsroom <[BC RCMP - RCMP warn the public about recent bail scam that often targets the elderly](#)>

¹¹⁸ Pat Foran, CTV News "Canadians lose \$50 million to romance scams in 2023: CAFC" online: <[Romance scams: Canadians lost \\$50M in 2023 | CTV News](#)>

- They discourage you from discussing the relationship with friends or family, attempting to isolate you from those who might be suspicious.

If you notice any of these red flags, be cautious and avoid sharing personal information or money. Always verify the identity of the person before taking any further steps.¹¹⁹

Recently in the Winter of 2024, an Ontario Resident of the Norfolk County, Simcoe was defrauded of \$400,000 to a romance scam. The scammer who posed as the victim's love interest met through Facebook, and their "relationship" spanned over a year and half, during which the fraudster asked the victim for money on several occasions through various methods of payments such as Apply pay, gift cards, etc. The scammer had been able to obtain funds from the victim by claiming "personal emergencies and business ventures".¹²⁰

e) Pig Butchering Scams

Pig Butchering Scams are when individuals are lured into crypto investments by perpetrators who get into contact with their victims through text messages. The perpetrators send these messages to potential victims, often stating they've appeared to have the wrong number but continue to engage in conversation. The people who respond to the text messages are convinced into sending funds, and soon after the perpetrators cut contact and disappear. Between the year of 2020 to 2024, there has been over \$75 billion dollars moved by criminal networks. The name of this scam derives from the "practice of farmers fattening hogs before slaughter". To make matters worse, many of the individuals responsible for sending the texts for pig butchering scams are also victims of human trafficking camps. Such camps are found in southeast Asia, and the United

¹¹⁹ Canadian Anti Fraud Centre, "*Romance*", online: *Canada* <<https://antifraudcentre-centreantifraude.ca/scams-fraudes/romance-rencontre-eng.htm>>

¹²⁰ Ryan Rocca, Global News "*Ontario resident loses more than \$400K in romance scam*", online: *Global News* <[Ontario resident loses more than \\$400K in romance scam | Globalnews.ca](https://www.globalnews.ca/story/ontario/2024/01/24/ontario-resident-loses-more-than-400k-in-romance-scam)>

Nations has predicted that over 200,000 people are being held in captive at these scam compounds.¹²¹

6. POLICY CONSIDERATIONS

As Canada's population continues to age, it is incumbent upon the legislators that policies are put into place to protect the integrity, interests and well-being of its elderly people.

Currently, there is no criminal offence of elder abuse, however, in the last years, sentencing provisions have been aptly used by courts with respect to crimes targeted at vulnerable people in order to bridge any policy gaps. While it remains to be seen how provincial and federal governments will continue to respond legislatively to the growing prevalence of abuse toward elderly populations, in the interim, many institutions are playing their part in spreading awareness to the general public in a bid to prevent elder abuse.

Recently, the Canadian Network for the Prevention of Elder Abuse launched *Future Us*, a pan-Canadian engagement website developed for people of all ages, designed to explore our country's collective goal in uphold the rights of seniors in Canada.¹²² This website provides information to assist in the recognition of, and safe and effective response to, elder abuse and neglect at the individual, community, and government levels, and provides recommendations to create an integrated approach for elder abuse prevention in communities across Canada.

Additionally, some regulatory leaders have begun implementing elder protections from a financial perspective. Recently, the Canadian Securities Administrators has taken steps to implement the "Trusted Contact Person" (TCP) strategy, designed in part to protect

¹²¹ Zeke Faux, Bloomberg | Time "New Study Estimates as Much as \$75 Billion in Global Victims' Losses to Pig-Butchering Scam", online: <[\\$75 Billion Lost to Pig-Butchering Scam, New Study Estimates | TIME](#)>

¹²² Canadian Network for the Prevention of Elder Abuse, "Future Us: Roadmap to Abuse Prevention" (24 March 2022), online: <https://futureus.cnpea.ca/roadmap/en/introduction>

older and vulnerable investors from financial exploitation.¹²³ In some provinces, securities dealers and their advisors must now take reasonable steps to obtain from their elderly client(s) the name and contact information of a TCP that the dealers and advisors can contact should they suspect potential financial exploitation or have concerns about a client's mental capacity to make financial decisions. Of course, in these cases, it will be important for elderly individuals to be careful about the person who they name as their TCP, so as to not provide their abuser further control over their finances. While a TCP does not have the authority to make transactions on the account, they will be given a certain level of control over an elderly individual's financial interests.

These are just a few of the initiatives started by non-governmental institutions.

7. CONCLUDING COMMENTS

As long as elder 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. In certain instances, civil remedies will be more appropriate, especially where the evidence cannot prove all the 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 court.

¹²³ For more information, visit the Canadian Securities Administrators' website, online: <<https://www.securities-administrators.ca/news/canadian-securities-regulators-publish-final-amendments-to-enhance-protection-of-older-and-vulnerable-clients/>>.

8. RESOURCES

- [WEL Partners Resource Centre](#)
- [CBA Elder Law Section Website](#)
- [OBA Elder Section Website](#)
- [Advocacy Centre for the Elderly](#)
- [British Columbia Law Institute's Canadian Centre for Elder Law](#)
- [Western Canada Law Reform Agencies](#): “Enduring Powers of Attorney: Areas for Reform”
- [Alberta Law Reform Institute](#) : “Enduring Powers of Attorney: Safeguards Against Abuse”
- [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”
- [Canadian Network for the Prevention of Elder Abuse \(CNPEA\)](#)
- [Elder Abuse Prevention Ontario Network \(EAPON\)](#)
- [FAIR Canada](#): “Report on Vulnerable Investors: Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity”
- [National Initiative for the Care of Elderly \(NICE\)](#)
- [International Longevity Center Canada: Canadian Coalition against Ageism](#)
- [CanAge: Canada's National Seniors' Advocacy Organization](#)

The contents are intended for the purposes of providing information and guidance only and are not intended to be relied upon as the giving of legal advice.

Kimberly A. Whaley, Whaley Estate Litigation Partners

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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

Wills and Succession Act, SA 2010, c W-12.2

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

Wills, Estates and Succession Act, SBC 2009, c 13

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

The Wills Act, CCSM c W150

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

Wills Act, RSNB 1973, c. W-9

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

Wills Act, RSNL 1990, c. W-10, s. 9

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

Wills Act, RSNS 1989, c. 505, s. 17

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

Succession Law Reform Act, RSO 1990, c. S.26 (“SLRA”)

Prince Edward Island

Adult Protection Act, RSPEI 1988, c A-5

Victims of Family Violence Act, RSPEI 1998, c V-3.2

Probate Act, RSPEI 1988, c P-21, s. 6

Quebec

The Charter of Human Rights and Freedoms, RSQ c C-12, art 48

Public Curator Act, RSQ c. C-81

An Act respecting access to documents held by public bodies and the protection of personal information, RSQ c A-2.1

Professional Code, RSQ c C-26

Code of Ethics of Advocates, RRQ 1981 c B-1 r.1

Civil Code of Quebec, CQLR c CCQ-1991

Saskatchewan

Victims of Domestic Violence Act, SS 1994, c V-6.02

The Public Guardian and Trustee Act, SS 1983, c P-36.3

The Wills Act, SSA 1996, c. W-14.1

Yukon

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

Family Violence Prevention Act, RSY 2002, c 84

Public Guardian and Trustee Act, SY 2003, c 21 Sch. C, Part 2

Wills Act, RSY 2002, c.230

Nunavut

Family Abuse Intervention Act, SNu 2006, c 18

Consolidation of Wills Act, RSNWT 1988, c. W-5

Northwest Territories

Protection Against Family Violence Act, SNWT 2003, c 24

Wills Act, RSNWT 1988, c.W-5