

# Elder Abuse: Civil vs. Criminal Remedies

**Ontario Police College - Investigations Involving Older Adults**

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# Introduction

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



# Societal Landscape: Canada

**25,000**

New cases of dementia every year

**BY 2068**

**29.5%**

**POPULATION**

**+65**

**1/2 Million**

**CANADIANS LIVING WITH  
DEMENTIA, INCLUDING  
ALZHEIMER'S**



# Statistics

## AVERAGE LIFE EXPECTANCY



12 million  
**SENIORS**  
BY 2061

# Overview of Elder Abuse

- Financial abuse most common
- Under reporting is an issue
- Often at the hands of family member(s)
- Difficulties presented by COVID-19



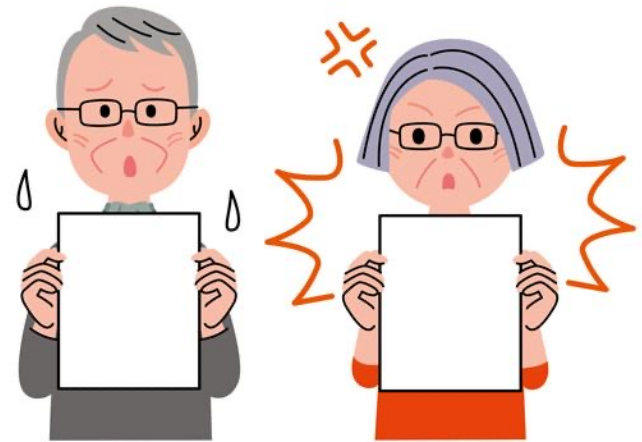
# Definition

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

- World Health Organization

# Examples

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



# Examples

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



# Indicators or “Red Flags”

- Changes in living arrangements
- Unexplained inability to pay bills
- Unexplained withdrawal of \$\$
- Changes in appearance
- Changes in spending



# Perpetrators

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



# Stranger Scams

- Grandparent Scams
- Charity Scams
- Prize Scams
- Emergency Scams
- Romance Scams
- Cyber Scams
- Mortgage/Predatory Lending Scams
- Crypto Scams



# Why Under-Reported?

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



# REMEDIES?

Civil vs. Criminal



# Criminal or Civil?

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

# Differences

## Civil

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

## Criminal

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

# Other Legislation – Provincial or Territorial

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

# *Criminal Code*

- Duty of Persons to Provide Necessaries [of Life] (s. 215)
- Criminal Negligence (s. 219) Causing Death (s. 220)
- Uttering Threats (s.264.1)
- Physical Assault (s. 265) or Sexual Assault (s. 271)
- Kidnapping (i.e., Unlawful Confinement) (s. 279)
- Theft by a Person Holding a Power of Attorney (s. 331)
- Misappropriation of Money Held Under Direction (i.e., Theft) (s. 332)
- Criminal Breach of Trust (s. 336)
- Theft, Forgery, etc., of Credit Card (s. 342)
- Stopping Mail with Intent (s. 345)
- Extortion (s. 346)
- Forgery (s. 366)
- Fraud (s. 386 - 388)
- Intimidation (s. 423)

# CRIMINAL REMEDIES

And Real-Life Cases



# Sentencing

## Sentencing Principals:

- Section 718.04 (“offence against vulnerable person”)
  - Abuse of a vulnerable person
- Section 718.2 (“other sentencing principles”)
  - Examples:
    - Abusing position of trust
    - Age and / or disability
  - Lengthier sentence

# Scams

## Scam Situations:

- Fraudster off-shore
- Untraceable money
- Police – no investigative power or authority, foreign jurisdiction
- No criminal remedy available



# Case Examples

## ***R. v. Cvetas*, 2022 ONSC 1640**

- Banking executive plead guilty to theft over \$5k
- Transferred \$317k from joint account held with older adult during one year period
- Received **12 months in prison** – ordered not to have authority over property/money/security of another person for **five years**

# Case Examples

## *R. v. Saucier*, 2019 ONSC 3611

- Financial advisor stole from elderly clients over 3-year period
- Found guilty of 10 counts of fraud over \$5k, 4 counts uttering forged dox, 1 count forgery
- Sentenced to **15 months** in jail

# Case Examples

## ***R. v. Duffenais*, 2021 CanLII 53781 (NFLD) (Sentencing: Elder Abuse)**

- Caretaker at nursing home assaulted and demeaned 84 year old resident
- Ms. A was a “very vulnerable victim” of a “person in a significant position of trust”
- No prior criminal record, Mr. Duffenais was sentenced to 3 months imprisonment followed by 12 months probation

# Case Examples

## *R. v. Barker*, 2019 NSPC 24

- Married couple providing care to wife's mother w/ dementia found guilty of fraud over \$5k
- Had mother sign lending and financing dox – left her on the hook for \$50k in loans
- Suspended sentence – **3 years probation and 6 months house arrest**

# Case Examples

## *R. v. Brush*, 2022 BCSC 1194

- Adult in her 70's requiring 24/7 care neglected to point of starvation – weighed 72 pounds
- Care giver of 13 years – gambling addict – did not fill prescriptions and allowed her to live in squalor
- Given **18-month sentence** and **18-month probation** order

# Case Examples

## *R. v. Wentworth*, 2023 ONSC 1379

- 27-year-old cold case – 92-year-old beaten and robbed in 1995 – died from her injuries
- Provided sworn videotaped statement – used to identify assailant
- Accused found guilty of robbery sentenced to **12 years in prison**

# CIVIL REMEDIES

And Real-Life Cases



# Common Civil Remedies

## Stop someone from acting as an attorney under a Continuing POA:

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



# Removal of an Attorney

## ***Aiello v. Bleta*, 2020 ONSC 62**

- An attorney was **removed** for failing to:
  - Approve reimbursement of expenses incurred by sister in caring for their mother and pay for the preferred caregiver/companion
  - Sign the required consent form for the mother to receive dental surgery; and foster regular contact between supportive friends/family

## **Criteria for removal:** *Teffer v. Schaefers Estate*, 2008 CanLII 46929 (ON SC)

1. Must be strong & compelling evidence of misconduct or neglect; and
2. The best interests of the incapable person are not being served.

# Common Civil Remedies

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

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

# Order an Accounting

## ***Bellefeuille v. Bellefeuille*, 2018 ONSC 6802**

- Attorney used grantor's funds to purchase appliances for her own home & co-mingled funds
- Failed to comply with Order to provide Accounting

## ***Moore v. McLean*, 2022 ONSC 295**

- Attorney removed for failing to provide accounting in a timely fashion and in an easily/conventionally understood format

# Common Civil Remedies

## Make someone repay the money taken:

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



# Repayment of Money Improperly Taken

## ***Picone v. Mossetti*, 2023 ONSC 1038**

- Son acting under POA compensated himself \$8k/year for 31 years despite provision in doc. that no compensation was payable
- While mother in LTC, withdrawals from joint account averaging \$9,800/month from Aug. to Dec. 2018 and \$47k/month in 2019
- Attorney ordered to repay his pre-taking of compensation and money improperly taken

# Common Civil Remedies

## Declare a transfer of property invalid:

- Joint tenancy risks – “rights of survivorship” unintended
- Bank accounts and real property
- Older adult did not intend property to go to child
- *Petrick (Trustee) v. Petrick*, 2019 BCSC 1319

# Common Civil Remedies

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

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

# Resulting Trust for Misappropriated Funds

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

- Son appointed Attorney for Property – breached his fiduciary duties by making unauthorized transfers from joint account for his own benefit
- Court orders that \$443,000 held on resulting trust for the benefit of the mother

# Remedies on Predatory Marriage

## **Predatory Marriages:**

- Form of financial abuse – abuser preys on vulnerable for financial gain through marriage
- One remedy: attempt to void or set aside the marriage itself in addition to many creative equitable approaches
- Overriding problem: predatory marriages not easily challenged at law – criteria for requisite capacity to marry at common law is unsettled

# Capacity to Marry

## *Durham v. Durham* (1885), 10 P.D. 80

- The contract to marry is a “**simple one**”
  - “**One which does not require a high degree of intelligence to comprehend.**”
  - *Durham v. Durham* applied in *Chertkow v. Feinstein* (*Chertkow*), 1929 CanLII 513 (AB CA)

# Canadian Legislation

- No specific legislation to regulate predatory marriages
- In Canadian law, **a marriage may be either void or voidable:**
  - **Void** if either party lacks capacity to marry – anyone with an interest has standing to attack marriage
  - Undue influence and duress render a marriage **voidable only** – only the parties to the actual marriage have standing to contest the validity of the marriage and only while both parties are living

# Equitable Remedies

- May gain traction in setting aside a predatory marriage
- Some commonly utilized forms of equitable relief include:
  - Declaratory orders, granting injunctions, specific performance, specific restitution, damages in equity, rescission, accounting, and rectification.

# Equitable Doctrines

Some equitable doctrines relevant to the issue of predatory marriage include:

- The doctrine of undue influence;
- The tort of deceit/civil fraud;
- The doctrine of unconscionability;
- Unjust enrichment;
- The Rule against using statute as an instrument of fraud;
- No one shall profit from his or her own wrongdoing (slayer's rule);
- *Ex Tupri Causa Non Oritur Actio*; and
- Lack of Independent Legal Advice.

# Predatory Marriages in the U.S.A.

- A minority of states have enacted legislation explicitly allowing for **post-death challenges** to a marriage's validity on grounds of **undue influence**
  - **Florida** – within four years of decedent's death
  - **Texas** – within one year of decedent's death
  - **California** – Probate Code presumes fraud or undue influence where testamentary document makes a gift to a caregiver who began marriage with grantor while providing services to grantor

# Predatory Marriages in the U.S.A.

- **New York's Estates, Powers & Trusts Law** – precludes one spouse from surreptitiously disinheriting the other
- *Matter of Berk*, 209 A.D.3d 1014,177 N.Y.S.3d 611 (2022):
  - A 99 year old man married his 48 year old caregiver. He died a year later
  - The surviving spouse commenced proceedings to determine the validity of a spousal election against the Deceased's estate. She was initially awarded summary judgment but was reversed on appeal
  - The appellate court found that a surviving spouse may forfeit or be **equitably estopped** from asserting an election when the spouse knowingly married someone incapable of consenting to a marriage or exercised **undue influence**

# Policy Considerations

- Need to bridge gaps between elder abuse prevention and convictions
- Legislative changes? Non-governmental initiatives?
- Canadian Network for the Prevention of Elder Abuse: *Future Us* Roadmap
- Canadian Securities Administrators: Trusted Contact Person (TCP)
- STEP: Client Service Resource - A Guide for Assisting Vulnerable Persons

# Conclusion



Keep eye out



Be aware of red flags



Criminal where appropriate



Civil with lesser burden

# Resources



<https://welpartners.com/resources/books>

**Elder Law:** <https://welpartners.com/resources/WEL-on-elder-law.pdf>

**Guardianship:** <https://welpartners.com/resources/WEL-on-guardianship.pdf>

**Powers of Attorney:** <https://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>

**Dependants' Support:** <https://welpartners.com/resources/WEL-on-dependants-support.pdf>

**Will & Estate Challenges:** <https://welpartners.com/resources/WEL-on-will-and-estate-challenges.pdf>

**Fiduciary Accounting:** <https://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf>

THANK YOU!  
Questions?

