

Summit on Aging: Demographics & Elder Abuse Uncovered & Understood

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Introduction

1. Demographics
2. Elder Abuse & Exploitation
3. Legal Capacity
4. Predatory Marriages
5. Power of Attorney Disputes
6. Guardianships
7. Living at Risk/Interventions




Statistics/Demographics

AVERAGE LIFE EXPECTANCY



1 in **11**  **>65**
CURRENTLY HAS ALZHEIMER'S
OR RELATED DEMENTIA

12 million
SENIORS
BY 2061

3/4 
million
**LIVING WITH
COGNITIVE
IMPAIRMENT**



ELDER ABUSE

An Overview

Elder Abuse

One example:

“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

Elder Abuse

Physical Abuse:

Actions or behaviours that result in bodily injury, pain, impairment or psychological distress



Elder Abuse

Financial Abuse:

An action or lack of action with respect to material possessions, funds, assets, property or legal documents.



Elder Abuse

Sexual Abuse: Direct or indirect involvement in sexual activity without consent.

Emotional/ Psychological Abuse: Severe or persistent verbal or non-verbal behaviour that results in emotional or psychological harm



Elder Abuse

Neglect:

Intentional withholding of basic necessities or care (active neglect) or not providing basic necessities or care because of lack of experience, information, or ability (passive neglect).



Perpetrators

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



Elder Abuse

Common **scams** targeting older adults:

- Charity
- Emergency
- Romance
- Prize

Real Life:

- **Romance Scam:** Global News
- Dating site, aggressive pursuit
- Bank Manager warned older adult
- \$140,000.00
- Loss of independence – sold house, car

Indicators or “Red Flags”

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



Why Under-Reported?

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



Remedies: Civil or Criminal?

Civil

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

Criminal

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

Criminal Code

- Failure to provide the necessaries of life (s.215)
- Physical or Sexual Assault (ss.265&271)
- Theft by a person holding a power of attorney (s.331) / Theft (s.332)
- Forgery (s. 366) / Fraud (ss. 386-388)
- Extortion (s. 346)
- Etc.

Sentencing Principals:

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

Real Life Cases:

Servello v Servello 2015

- Son took mother to registry office - transferred title into joint names
- Mother thought she was signing a CPOAP
- Court set aside transfer
- Mother vulnerable, no ILA

Real Life Cases:

***R v Davy* 2015 - Failure to Provide Necessaries of Life s.215**

- Legal duty to provide – under a person’s “charge”:
 - a) Unable to withdraw from charge due to age, illness, mental disorder etc.
 - b) Unable to provide for themselves

R v Davy cont.

- Daughter and son-in-law attorneys for personal care of elderly mother
- Charged with failing to provide the necessities of life
- Cat urine, filth & feces, squalor, deplorable conditions
- Clear case of elder abuse
- Sentenced to 12 months each

Real Life Cases

***R v Saucier* 2019 - Fraud, Forgery**

- Financial advisor defrauded elderly clients & misused funds (\$215,000.00)
- Victims were paid back all monies, but suffered emotional impact & trust issues
- Sentenced to 15 months in jail

LEGAL CAPACITY

Overview

Capacity in General

- No single legal definition for “capacity”
- No single “test” for capacity, not really a test
- Certain factors are to be considered in an assessment of requisite mental capacity to make a certain decision/undertake a certain task at a particular time

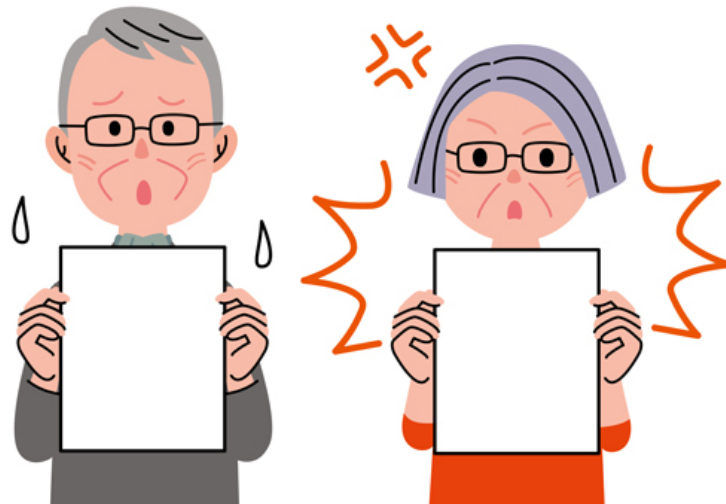


Capacity is:

- **DECISION** specific
- **TIME** specific
- **SITUATION** specific
- Capacity may **FLUCTUATE**



- Understand all of the information that is *relevant to the decision being made* and *possible implications* of the decision in question



Capacity to Manage Property

- Section 6 – *Substitute Decisions Act*
 - a) Understand information relevant in making decision in management of property; **and**
 - b) Appreciate the reasonably foreseeable consequences of a decision or lack of decision

Capacity to Make Personal Care Decisions

- Section 45 - *Substitute Decisions Act*
 - a) Ability to understand the information that is relevant to making a decision re health care, nutrition, shelter, clothing, hygiene or safety, **and**
 - b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Substitute Decisions Act, 1992 SO 1992, c.30

- “Section 3 Counsel”, special type of retainer
- **Counsel for person whose capacity is in issue**
- **3** (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
 - (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
 - (b) the person shall be deemed to have capacity to retain and instruct counsel. 1992, c. 30, s. 3 (1).

Substitute Decisions Act, 1992 SO 1992, c.30

- **Responsibility for legal fees**
- (2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the *Legal Aid Services Act, 1998* in connection with the proceeding, the person is responsible for the legal fees. 1992, c. 30, s. 3 (2); 1998, c. 26, s. 108.

Substitute Decisions Act, 1992 SO 1992, c.30

- (3) Nothing in subsection (2) affects any right of the person to an assessment of a solicitor's bill under the *Solicitors Act* or other review of the legal fees and, if it is determined that the person is incapable of managing property, the assessment or other review may be sought on behalf of the person by,
 - (a) the person's guardian of property; or
 - (b) the person's attorney under a continuing power of attorney for property

Lawyers must assess capacity to:

- Instruct counsel;
- Make a will (Testamentary Capacity);
- Grant / revoke POA;
- Enter into a contract (transfer property);
- Etc.

Capacity to Marry & Predatory Marriages

- Where unscrupulous individuals prey upon older adults with diminished reasoning ability for their own financial profit
- Hallmarks: age gap, one person wealthy, secrecy, alienation, sequestering, etc.



Consequences of a Predatory Marriage

- Problematic as marriage still automatically revokes a Will (in most provinces).
- Also problematic due to property rights and other entitlements.



Capacity to Marry

- Not easily challenged
- Centuries old understanding for “capacity to marry” as developed at common law is that the contract to marry is a “**simple one**”
- “does not require a high degree of intelligence to comprehend”



Four Historical Themes

- Equivalent to capacity to contract
- Marriage has distinct nature of rights, responsibilities, obligations that must be appreciated
- Contract of marriage is a “simple one”
- Factors for determining capacity to marry are the same as capacity to manage property, or require one having capacity to manage the person and property

Capacity to Marry

- No single complete definition of capacity to marry
- Judicial spectrum:
 - One end - marriage is but a mere “simple” contract
 - Other end – the requirement to marry is not so simple, must be capable of managing property or one’s person or both

Challenging Predatory Marriages

- Standing – who can bring a claim?
- *Void ab initio*: never existed, no capacity, anyone with an interest
- *Voidable*: valid but cause for ending marriage existed at outset - undue influence, fraud, only parties to marriage

Devore-Thompson v Poulain 2017 (BC)

- Niece brought claim after death of aunt
- Predator met aunt at local mall
- “Consistent campaign” to access aunt’s funds post-marriage
- Marriage set aside as void *ab initio* for lack of requisite capacity to marry

Predatory Marriages

- Absence of clear legislation defining requisite capacity to marry, common law remains unclear
- Until factors are refined (such that it takes into consideration financial implications) those with diminished capacity will remain vulnerable to exploitation through marriage
- Equitable remedies a solution?

POWER OF ATTORNEY DISPUTES

And How to Resolve Them

Types of Power of Attorneys

- 1) General POA
- 2) Continuing POA for Property
- 3) Power of Attorney for Personal Care

CPOAP Capacity Criteria

- Knowledge of property
- Obligations to dependants
- Knows attorney's extensive powers
- Knows attorney must account
- If capable may revoke
- Appreciate that attorney may mismanage \$, value decrease or may misuse authority

Continuing POA for Property

- Must be capable **to grant** a CPOAP: criteria
- **Extensive powers**: anything except make a Will
- **Effective immediately** upon signing (unless triggering event)

Power of Attorney for Personal Care

Must have ability to:

- 1) Understand whether the proposed attorney has a genuine concern for person's welfare; **and**
- 2) Appreciate that the person may need to have attorney make personal care decisions for them.

POA Disputes

- **Involve:** fights over property management, depletion of wealth, unequal gifting, loans etc
- **Causes:** never understood nature & extent of powers granted; never considered chosen attorney: could be trusted? act honestly?

POA Disputes

- Claims of misuse/abuse of POA document
- See to terminate POA document, remove or replace attorney
- Claims brought AFTER grantor dies
- “Competing” POA documents
- Parents do not want to make “waves”

POA Disputes

Civil Litigation:

- Breach of fiduciary duty/obligation
- Fraud / breach of trust
- Incapacity / undue influence
- Passing of accounts
- Guardianship,
- Transfer of title to property improperly taken, etc.

Real Life Cases:

***McMaster v McMaster* (ON): Accounting ordered, Removal of Attorney**

- Brother invests \$2 million of mother's money into dubious business ventures – go-kart businesses
- Loses money
- Court removes brother as attorney and orders him to pay back \$



POA Disputes

Alternative Dispute Resolution (ADR):

- Mediation
- Arbitration
- Family meetings (with or without counsel) etc.

POA Disputes

Criminal Prosecution:

- Section 331 – “Theft by a Person Holding a Power of Attorney”
- Or, general “Theft”, “Fraud” provisions etc.

Real Life Cases:

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

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



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

Real Life Cases:

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

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



Tips: Solicitors

- Education on POA as planning tool
- Meet client alone and in person
- Be alive to capacity & undue influence issues
- Review WHY the grantor is making a POA?
- Discuss CHOICE of attorney
- Make detailed NOTES

Tips: Litigators

- Strategize and devise tailored conflict resolution plan
- Consider cost & means of the client
- Consider health, age of parties
- Will court process effectively resolve dispute?
- Applications for advice & directions under *SDA*

GUARDIANSHIPS

Guardianships

- Fiduciaries – substitute decision makers for incapable individuals
- Different than an attorney under a POA – appointed by a Court (after a person becomes incapable) rather than chosen by the grantor (while grantor still capable)

Guardianships

- Guardian of the Person
- Guardian of Property
- Wishes of incapable person play important role in who shall be appointed guardian: *Lazaroff v Lazaroff*
- Choice of last resort

Guardianships

- Procedure / Process in *Substitute Decisions Act*
- “Management Plan”
- Surety bond
- Duties & Obligations: diligently, with honesty, integrity and in good faith for the incapable person’s benefit.

LIVING AT RISK

Interventions

Risks

Internal Factors

- Increasing age
- Cognitive impairment
- Sensory impairment
- Daily activity impairment
- Malnutrition, etc.

External Factors

- Lack of social network
- Dependence on care provider / living alone
- Lack of community resources
- Poverty, etc.

Risk & Intervention

- Willingness to accept intervention?
- *Public policy*: individual's fundamental rights, autonomy delicately balanced with societal demands to protect vulnerable & intervene

What can we do?

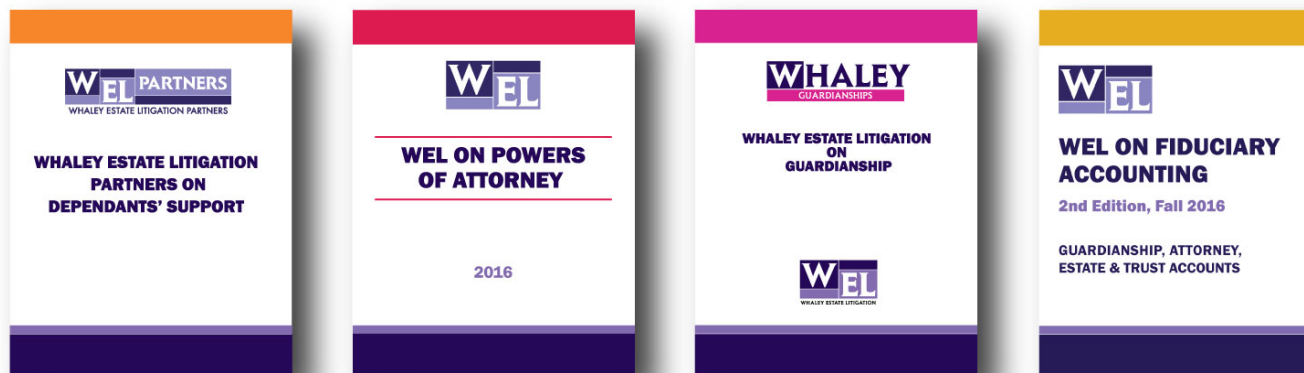
- Raise awareness;
- Improve knowledge transfer;
- Develop best practices, research, intervention strategies;
- Education & training, protocol, legal action
- Action plans, increase resources & community response, review laws, etc.

Conclusion

- Several civil & criminal remedies
- Stop elder abuse before it starts
- Be aware of red flags

WEL Partners Resources

WEL resource books are available to download in PDF format.



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

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

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

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

Internet Resources

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

THANK YOU!
Questions?

