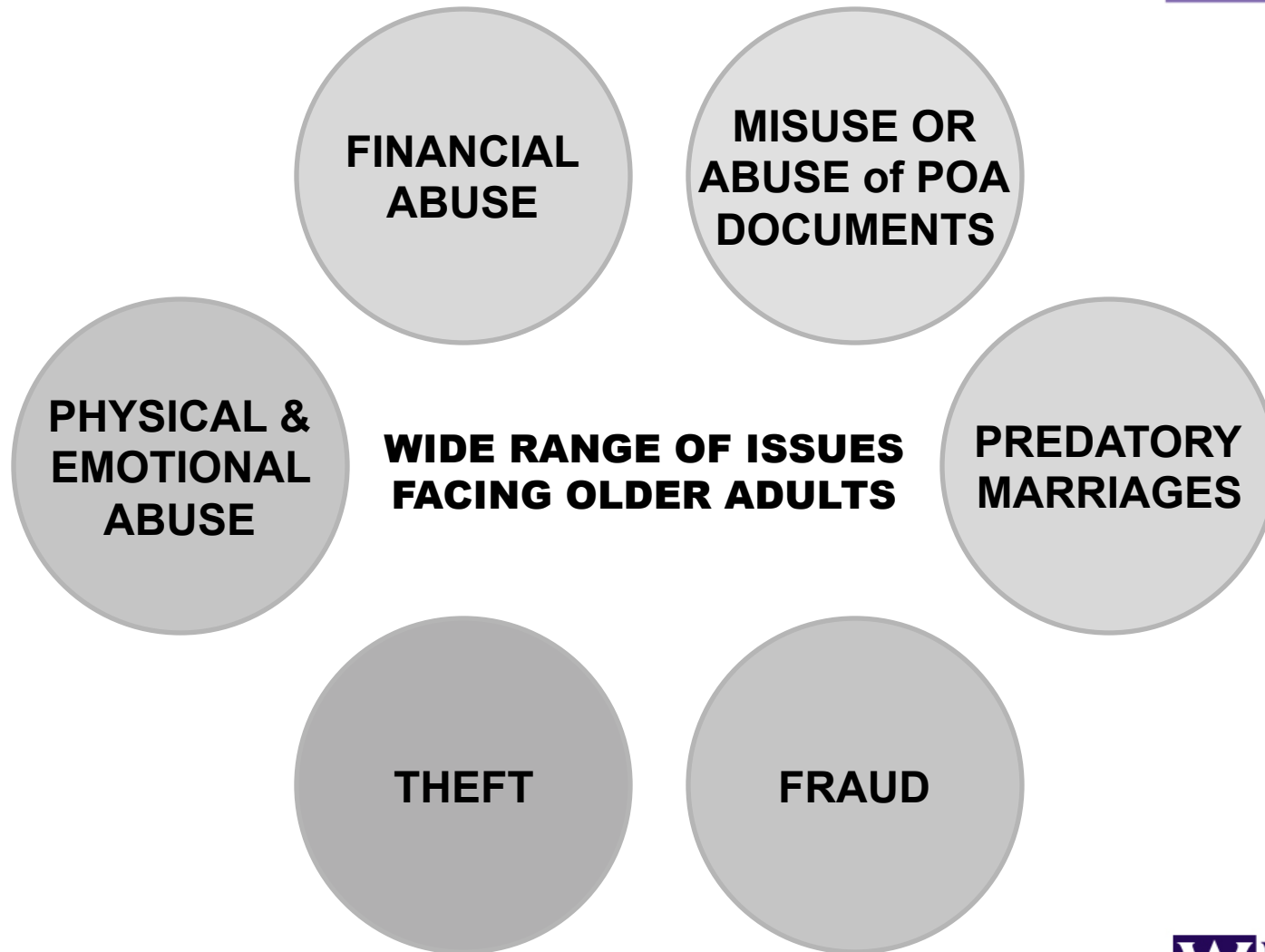


Ontario Police College Conference
Elder Abuse Investigators Course
April 26, 2016
By Kimberly A. Whaley, WEL



Introduction





RAPIDLY AGING SOCIETY



**INCREASE IN MEDICAL ISSUES AFFECTING
COGNITION AND CAPACITY**



**HYPER GROWTH IN SUSCEPTABILITY TO
BECOMING VULNERABLE AND DEPENDENT**

Statistics



15%
POPULATION
+65

11 million
SENIORS
BY 2036

AVERAGE LIFE EXPECTANCY

89



86

3/4 
million
LIVING WITH
COGNITIVE
IMPAIRMENT

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

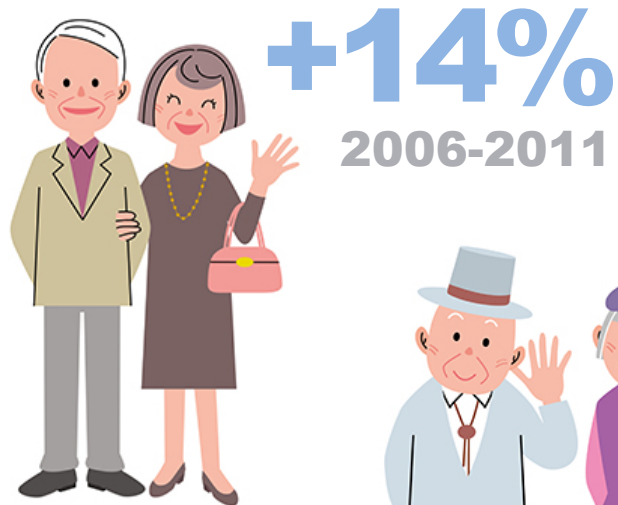


Shift in Family Dynamic



- Family and Societal relationships are changing
- Second , third, or more marriages are increasing
- Growth in later in life common law partnerships (60-64 years old)

COMMON-LAW COUPLES



13% FAMILIES WITH CHILDREN ARE
STEP-FAMILIES
1 or MORE CHILDREN NOT BIOLOGICALLY RELATED

41% STEP-FAMILIES ARE
“COMPLEX” FAMILIES
1 CHILD of BOTH PARENTS & 1 CHILD of ONLY ONE PARENT



- Exploitation, financial abuse and undue influence of older adults can occur in the context of:
 - marriage,
 - co-habitation,
 - separation, and
 - divorce
- When does an older adult have the requisite capacity to make these life decisions for themselves?



CAPACITY CONCEPTS

An Overview

Capacity Concepts



- What is Capacity?
- Legally everyone is presumed 'capable'
- No single definition



- Capacity is **decision** specific



- Capacity is **time** specific



- Capacity is **situation** specific



- Capacity in general:
 - Ability to understand all the information that is relevant to the decision being made and the ability to understand the possible implications

- Mental disorders not equated with incapacity

- Unwise decision not equated with incapacity



“Machiavellian Plotting”

- Rift between older adult parents and adult children
- Parents choose to side with one daughter
- Son argues Mother lacked capacity to grant a Continuing Power of Attorney for Property (“CPOAP”) to her husband

- Mother was not capable of ‘sophisticated reasoning’ and unable to manage her financial affairs
- Mother was capable of:
 - taking a taxi,
 - making and keeping medical appointments,
 - buying groceries,
 - managing basic household affairs.
 - understood nature and purpose of POA and had complete confidence in her husband to look after her finances



- Mother was not capable of managing her own money, BUT was capable of granting a CPOAP

Capacity Assessments:

- Balancing of fundamental rights & freedoms with the protection of the vulnerable
- Rights' Advice
- Will not be court ordered lightly
- Law prioritizes the dignity, privacy and autonomy of older adults

CAPACITY ISSUES

With respect to Marriage/Separation/Divorce



Predatory Marriages



- Where unscrupulous opportunists prey on older adults with diminished reasoning ability purely for financial profit



Predatory Marriages



- Traditionally challenged at Common Law by arguing lack of requisite decisional capacity
- Capacity to marry criteria (easily met):
 - Older adult must appreciate the nature and effect of marriage including responsibilities, state of previous marriages and the effect on one's children
 - Yet, may have to have requisite capacity to make personal care and property decisions

Predatory Marriages



- **Characteristics/Hallmarks:**
 - One spouse significantly advanced in age and older than the predator spouse
 - Susceptible to exploitation/influence because of loneliness loss of spouse, illness, physical disability, incapacity etc.
 - No children of the union
 - One spouse finances the relationship
 - Alienation, secrecy, sequestering etc... from family/friends



“84 Year Widower and 31 Year old Waitress”

- Terminally ill with prostate cancer, castrated, depressed, living in a retirement home
- Marries waitress and signs new Will and CPOAP
- Court: Had requisite decisional capacity to marry, but not to execute Will
- “willing victim”?
- Wife inherited through intestacy legislation since marriage revokes a Will in Ontario



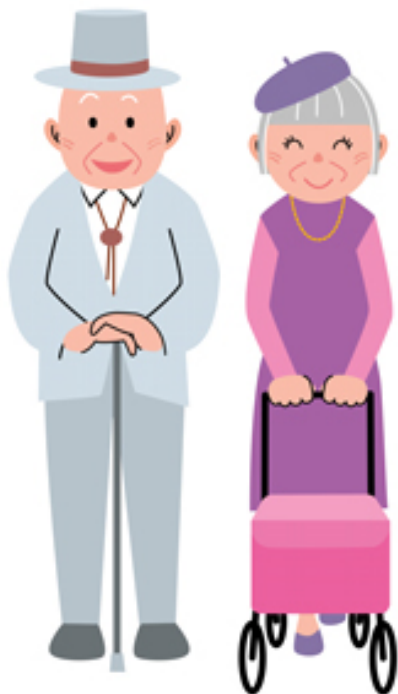
“The Caregiver Who Just Wanted To Take”

- Elderly widower and younger caregiver
- Married under pretence he would not be put in a home
- New Will benefiting caregiver
- Transfer of house to caregiver’s son
- The Outcome: With help of neighbour obtained a divorce and house transfer and others were set aside
- Severely affected by predatory actions
- “lovely and cheerful” to “downcast and downtrodden”

Predatory Marriages



- Watch for red flags of a predatory marriage/relationship but all situations need to be examined on own unique facts





- When does an older adult not have decisional capacity to form the intention to separate from his or her spouse?



“The Abusive Husband”

- Older adult admitted to hospital with injuries to her body
- Medically certified incompetent
- Abused by husband, wants to remain in care home and not live with husband
- BUT could not name the care home or address, forgot most things, could not file a tax return etc.

Separation



- Decision to separate is the simplest act requiring the lowest level of understanding: A person must know with whom he or she does not want to live
- Wife wanted to live separate and apart from her husband



- **Capacity to Divorce?**
- Still simple, but requires a bit more understanding than the decision to separate
- Desire to *remain* separate and to no longer be married to one's spouse
- Understand nature and consequences
- An undoing of the contract of marriage



“Younger 2nd Wife vs. Adult Children”

- 85 year old man wanted to divorce his 55 year old second wife
- Wife: Husband still loves me, being pressured by his greedy children
- Court: Husband had an independent intention to divorce his wife, severed joint ownership of house etc.



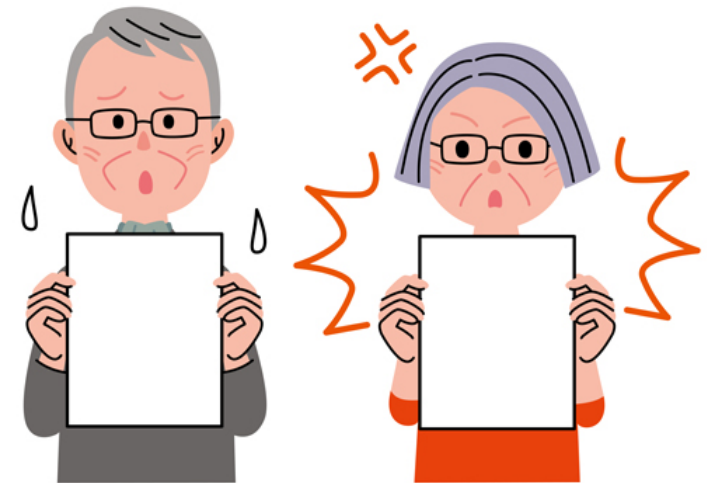
FINANCIAL ABUSE

Of Older Adults

- **Financial Abuse** – most commonly reported type of abuse:
 - Procuring and use of joint accounts
 - Fraud/Forgery
 - Abuse and Misuse of CPOAP
 - Sharing home without payment
 - Stealing/transferring assets & property etc.
 - Transfer of Real Property without Consideration

POA Abuse and Misuse:

- Used to protect vulnerable and minimize conflict
- However, also may cause rather than prevent conflict
- Used abusively to cause harm through fraud, neglect and depletion of wealth





Continuing Power of Attorney for Property ("CPOAP"):

- Effective immediately
- Extensive powers-very POWERFUL tool!
- Must choose attorney(s) wisely
- Trust, Honesty, Integrity-most important consideration
- Fairness to children – ill founded consideration



“Go-Karts for Mother”

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

Jointly Held Assets

- Transfer of real property into joint names to avoid probate
- Pay the probate!
- Joint bank accounts to assist with banking or also to avoid executing a Will
- “Rights of Survivorship”? Or Presumption of Resulting Trust?

- Presumed to be held in trust by adult child for parent or parent's estate
- **UNLESS** evidence of intention that it was a gift



“Of Course Mom Wanted Me to Have Her House”

- Older adult transfers house into joint names with daughter
- Daughter sells house and keeps all proceeds when mother dies – Will says grandchildren were to receive money
- Court: Mother did not gift house to daughter



CIVIL AND CRIMINAL REMEDIES

Case Examples

- Criminal remedies do not always attract criminal charges-due to nature of relationship and issues of capacity
- Victim may be unwilling to report a loved one
- Act may not be criminal in nature, rather civil in nature
- Civil prosecutions are expensive and time consuming
- Incarceration v. restitution?



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

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

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

“The Crooked Lawyer”

- McMichael Art Collection
- Night her husband died – consoled her and had her sign a CPOAP, he was sole attorney for property
- Used her assets as his own while she was still alive- depleted estate
- Did not notify charity after death/executor



- Expensive dinners
- New clothing
- Limousines
- Sailing trips to Bermuda
- Used her BMW
- Put her valuable art collection on his own walls
- Lost art etc.

- Paid himself over \$350,000 CAD and \$85,000 USD
- Court ordered money to be paid back
- Incarcerated-failed to account-contempt of court
- Died shortly after case (in a Hot Tub!?)



Criminal Proceedings:

- Theft by power of attorney (s.331)
- Theft (s.322)
- Criminal Breach of Trust (s.336)
- Forgery (s.366)
- Extortion (s.346)
- Fraud (s.386-388)
- Failure to provide the necessaries of life (s.215)
- Criminal negligence (s.219) etc.



Sentencing Principals:

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



R v Bernard

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

R v Kaziuk

- Used a CPOAP granted by mother to take out mortgages on her properties
- Defaulted and left her penniless and homeless
- Sentenced to 10 years but 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”



R v Taylor

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

R v Owen

- Forged a deed and transferred parking space into his own name
- Thought he was transferring entire condo
- Financial abuse of elderly a factor in his sentence
- 18 months



R v Daly

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



UNDUE INFLUENCE

An Overview

Undue Influence



- Equitable principal used by courts to set aside or invalidate transactions that have been obtained by undue influence or coercion
- Ability of one person to dominate the free will of another
- Donor's mind falls short of being wholly independent

- **Actual Undue Influence:** force, cheats, manipulates
- **Presumed Undue Influence-by relationship:** where potential for domination inheres in relationship itself
- Examples – solicitor and client, parent and child, guardian and ward etc.
- BUT each relationship needs to be examined



“The Domineering Daughter”

- Daughter influenced her mother to transfer all of her assets (house and investments) into joint names
- Other two children inherited nothing
- Court found relationship between older mother and daughter had a potential for domination – gave rise to presumption of undue influence



- Mother relied on daughter's judgment
- Daughter had dominant personality
- Husband had looked after finances – now relied on daughter
- Always took daughter's advice
- Daughter wrote letters on her behalf
- Would never contradict daughter



RED FLAGS

A Summary



“The Sketchy Son”

- Older adult named one of her sons as attorney
- Son transferred mother’s house into his name using CPOAP for \$2
- Transferred \$175,000 into his own name
- Brothers asked Court to remove him as attorney and set aside transfers
- Court agreed

Court's indicators of potential for undue influence:

- Dependent
- Vulnerable
- Socially isolated
- Recent family conflict
- Recent bereavement
- A new Will inconsistent with prior Will



“The Bullying Beneficiary”

- Another undue influence case – pressure to change a Will
- Older adult executed new Will benefiting only one family member, excluding others

- **Court's indicators of Undue Influence:**
 - Increasing isolation
 - Dependence
 - Pre-death transfers
 - No reason or explanation
 - Beneficiary chose lawyer
 - Beneficiary conveyed instructions
 - Afraid



- **Summary of Other Red Flags and Indicators:**
 - Hesitation or confusion
 - Difficulty remembering details
 - Cognitive difficulties
 - Recent / Significant medical events
 - Physical impairments
 - Changes in living arrangements
 - Unexplained or sudden inability to pay bills



- Unexplained or sudden withdrawals of money
- Poor living conditions in comparison with assets
- Changes in banking patterns
- Changes in appearance
- Confusion or lack of knowledge about financial situation
- Unexplained disappearance of possessions (jewellery, silverware)



- Necessaries of life being denied by attorney (food, medication, assistive devices)
- Being overcharged for services
- Denying an older adult's right to make financial decisions
- Dependent upon beneficiary
- Socially isolated
- Recent family conflict or bereavement
- Move to a new city

- Substantial pre-death transfers
- Use of a lawyer previously unknown to and not chosen by older adult
- Any evidence of fearfulness or reluctance to be around a certain person

CONCLUDING COMMENTS





- Theme: Balancing older adult's autonomy & privacy with need to protect society's vulnerable
- Not an easy balancing act
- Knowledge, Information & Education are key
- Elder law issues are not going away and will only increase as the population ages – a real social issue
- Community Networking of professionals and service providers in all sectors is vital



Resources can be found on our website:

<http://www.whaleystateelitigation.com>

under “Resource Centre”

- THANK YOU AND QUESTIONS?

