



ELDER ABUSE CHECKLIST: CIVIL & CRIMINAL REMEDIES

TYPES OF FINANCIAL ABUSE

- misusing or abusing a Power of Attorney document;
- stealing an older adult's money, pension cheques, or possessions;
- committing fraud, forgery or extortion;
- sharing an older adult's home without paying a fair share of the expenses;
- unduly pressuring a senior to:
 - Sell personal property
 - Invest or take out money
 - Buy alcohol or drugs
 - Make or change a will
 - sign legal documents they do not understand including documents that transfer assets into joint names;
 - Give money to relatives, caregivers or friends
 - Engage in paid work to bring in extra money.¹

INDICATORS OF FINANCIAL ABUSE

- changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without senior's permission;
- unexplained or sudden inability to pay bills;
- unexplained or sudden withdrawal of money from accounts;
- poor living conditions in comparison with the older adult's assets;
- changes in banking patterns due to pressure;
- changes in the older adult's appearance;

¹ NICE – Tools for Preventing and Intervening in Situations of Financial Abuse, <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario> [Accessed September 12, 2014]

- controlling an older adult's spending;
- confusion or lack of knowledge about financial situation and signing of legal documents;
- being forced to sign multiple documents at once;
- being coerced into a situation where a senior is being overworked and underpaid;
- unexplained disappearance of possessions (lost jewellery or silverware);
- changes in a senior's power of attorney;
- necessities of life denied or not provided by an older adult's attorney under a POA (shelter, food, medication, assistive devices)
- being overcharged for services or products by sales people or providers; or
- denying an older adult his/her right to make independent financial decisions.

REASONS WHY AN OLDER ADULT MAY NOT REPORT FINANCIAL ABUSE

- The older adult feels shame or embarrassment that they have been victimized;
- They are fearful of the perpetrator or have a fear of the police or other authorities;
- They are dependent upon the perpetrator for their physical well-being;
- They want to protect the abuser, especially if they are a family member;
- The older adult may feel that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is their only family member or friend;
- They feel guilty for becoming a victim or they blame themselves;
- A coping mechanism may be to minimize or rationalize away the abuse or they may deny the abuse altogether;
- Some may not even recognize it as abuse; or
- Others may not be able to report even if they have the desire to: they may not have the physical capabilities to report or may be suffering from dementia or lack mental capacity.

CIVIL REMEDIES

In a civil court case the plaintiff (the older adult or victim) must use evidence to prove on a "**balance of probabilities**" that the perpetrator caused the harm (i.e. more likely than not) rather than the higher criminal standard of proving "beyond a reasonable doubt".

Once it is proven that the perpetrator committed the wrong, the civil court may order one or several remedies, including the following:

- Removing an attorney under a Continuing Power of Attorney for Property;
- Requiring an attorney to “account” for their dealings with property;
- Ordering the repayment of money stolen or taken from the older adult by an attorney or other person;
- Declaring that certain property or assets belong to the older adult or that the perpetrator was only holding the property “in trust” for the older adult;
- Ordering that a transfer of certain property be “set aside” or that is no longer valid;
- Custodial sentence (in some circumstance i.e. breach of trust);
- Ordering that the perpetrator vacate the property if he or she is living with the older adult without their permission or order that the perpetrator pay rent;
- Ordering that the perpetrator pay legal costs and interest.

QUASI- CRIMINAL REMEDIES - HABEAS CORPUS APPLICATIONS

- There have been an increasing number of cases involving the removal of elderly individuals with cognitive disabilities (the “Abductee”) from his or her home by one or more family members (the “Abductors”), who place the Abductee in a location they do not disclose to other members of the family. When family members have insufficient evidence about the Abductee’s incapacity, are not POAs or guardians, do not know where the Abductee is located and if there is a concern for the Abductee’s safety, it may be necessary to make recourse to a extraordinary remedy, namely that of Habeas Corpus under the *Habeas Corpus Act (“HCA”)*.²
- The writ of *habeas corpus ad subjiciendum* (the “Writ”) originates in the common law and is a means of determining the validity of a person’s detention. The writ traditionally applied and is still most prevalent in the criminal law context. Although, it is now used to retrieve individuals from detainment.
- In bringing an application for a Writ, the applicant must provide notice of the Application to the Attorney General 48 hours before making the application.³
- Section 1(1) of the HCA sets out when a court may award the Writ.
- In the case of Maron Arun, an incapable elderly man, was picked up by his two daughters who were his Power of Attorney for Personal Care and Property. They informed his wife Juliette (second wife) that they would return him to his home later

² The *Habeas Corpus Act*, RSO 1990, c H 1 (“HCA”)

³ *Ibid* s. 1(2)

that evening. However, they failed to do so. Although Juliette contacted the daughters to find out his whereabouts, the daughters refused to provide her with the information and the police offered little assistance because Manon was with his daughters who were his appointed POAs.

- Given that Juliette had not been granted a POA by Manon despite his intention to revoke the POAs and create new POAs in favour of his wife, and no formal assessment of Manon's capacity had been conducted prior to his abduction, Juliette had very little power under the Substitute Decisions Act⁴ to have her husband returned on a timely manner.
- Juliette brought an application for the return of her husband under the SDA and the HCA.
- Juliette had evidence that her husband was confined or restrained of his liberty, as she received a phone call from him in which he anxiously expressed that he wanted to come, but was unable to identify his location.
- Furthermore, the following factors added to the justification of bringing an urgent application seeking this extra ordinary remedy:
 - Juliette had proof that the daughters were preventing the father from accessing his finances for the purpose of meeting his own personal needs,
 - The daughters had a history of cancelling the fathers doctors appointments,
 - Manon was suffering from Alzheimer's and cancer was a legitimate concern that Manon's health needs were not being properly met,
 - The Police's unwillingness to get involved in the family dispute.
- The potential success of this remedy was not tested in court, as the daughters returned their father before the return of the application.
- The seriousness of the Habeas Corpus Application and severe consequences for disobeying a Writ may have provided sufficient incentive for the unresponsive Abductors to return the Abductee without a court order.

CRIMINAL REMEDIES

While the *Criminal Code* does not provide for the specific offence of "elder abuse", or "financial abuse" there are however, in-or-about ten separate offences under which such a perpetrator could be charged. All elements of the charge must be proven "**beyond a reasonable doubt**":

- Section 331: Theft by a Person Holding a Power of Attorney;

⁴ The *Substitute Decisions Act*, 1992, SO, c 30 ("SDA")

- Section 322: Theft;
- Section 336: Criminal Breach of Trust (Conversion by Trustee);
- Section 366: Forgery;
- Section 346: Extortion;
- Section 386-388: Fraud;
- Section 215: Failure to Provide the Necessaries of Life;
- Section 219: Criminal Negligence.

Sentencing Considerations:

- Section 718 of the *Criminal Code* references a wide range of aggravating factors considered by the Court in determining appropriate sentencing principles.
- 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

QUESTIONS TO ASK WHEN INVESTIGATING FINANCIAL ABUSE⁵

- Is there evidence of money or property missing or unaccounted for? Does the alleged offender hold a power of attorney for property?
- If the victim is capable, visit the victim and obtain financial particulars (the name of the attorney, name of their bank, contact information at the bank branch, account numbers, Old Age Security and Canada Pension Plan information etc.). Once authorized by the victim, look for alternative sources of information (e.g. family members, friends, lawyer who represented the victim when POA was signed).
- Obtain from the victim a completed consent form for the release of their financial records / bank information. Also obtain a copy of the POA for Property.
- Let the victim know they have a right to revoke the POA (if capable to do so⁶). Suggest that the victim get legal advice about how to do so as soon as possible.
- Contact the financial institutions immediately. Speak to a senior employee of the financial institution (a branch manager, customer service manager etc.) and advise them that you are conducting an investigation into the accounts of the victim. Confirm with them that the information that the victim gave you is accurate.

⁵ Summarized from the National Initiative for the Care of the Elderly's Officer Investigation Guide: <http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officers-investigation-guide>

⁶ See Capacity Checklist http://www.welpartners.com/resources/WEL_SummaryofCapacityCriteria.pdf

- Take a formal statement from the victim. Obtain a video statement, audio statement or written statement (be mobile – take a camera to the victim when resources allow. In some cases, a dying declaration may be required. Consult your local Crown Attorney for guidance).
- Take the victim’s consent form to their financial institution(s), government offices (OAS, CPP) and as when you will be provided with the pertinent financial records/evidence.
- Continue to investigate as required. Identify other means of obtaining evidence (e.g. production order, search warrant, other judicial orders of suspect’s account(s), records from retirement home or long-term care facility, etc.)
- If there is adequate evidence, recommend or lay the appropriate theft charge, (e.g. theft over \$5,000 or theft under \$5,000) citing s.331 and/or other relevant sections of the *Criminal Code* noted above.
- Conduct your investigation and document evidence in a way that enables the Crown to recommend an increased penalty under appropriate sentencing provisions due to age related vulnerability of the victim.
- If a criminal charge is recommended or laid, consider having the accused resign as the attorney. Their resignation could also be a condition of release.⁷

If the victim has been found mentally incapable of making property decisions or incapable of giving consent to release financial documents:

- Consider enlisting the aid of other agencies (ex. Public Guardian and Trustee) to provide support to the victim.
- Contact the financial institution immediately and request disclosure of required financial information as per the relevant privacy legislation and the decision of *R v. Lillo*.⁸ Financial institution staff can release general information without a warrant under certain circumstances. Request that the financial institution exercise ‘due diligence’ in relation to the victim’s accounts from this point forward.
- Still take a formal statement from the victim.
- Obtain consent from any person named as attorney in order to retrieve financial records. If consent is not attainable, consider other means to obtain this information (production order, search warrant, other judicial orders). Attend financial institutions to gather pertinent financial records / evidence.⁹

⁷ Excerpted from <http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officers-investigation-guide>

⁸ 1994 CanLII 7548 (ON SC), upheld on appeal 1999 CanLII 2836 (ON CA)

⁹ Excerpted from <http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officers-investigation-guide>

OTHER RELEVANT PROVINCIAL/ TERRITORIAL LEGISLATION

Alberta

- *Adult Guardianship and Trusteeship Act*, SA 2008 c A-4.2 <http://canlii.ca/t/522k5>
- *Protection Against Family Violence Act*, RSA 2000, c P-27 <http://canlii.ca/t/5347k>
- *Protection for Persons in Care Act*, SA 2009 c P-29.1 <http://canlii.ca/t/52dxl>

British Columbia

- *Adult Guardianship Act*, RSBC 1996, c 6 <http://canlii.ca/t/52c92>
- *Adult Guardianship Act, Designated Agencies Regulation*, BC Reg 19/2002, <http://canlii.ca/t/jjwx>
- *Community Care and Assisted Living Act, Residential Care Regulation*, BC Reg 96/2009, Schedule D <http://canlii.ca/t/53fvs>
- *Adult Guardianship (Abuse and Neglect) Regulation*, BC Reg 13/2000 <http://canlii.ca/t/lck8>
- *Public Guardian and Trustee Act*, RSBC 1996, c 383 <http://canlii.ca/t/53j4w>
- *Health Professions Act*, RSBC 1996, c 183 <http://canlii.ca/t/534hx>
- *Personal Information Protection Act*, RSBC 2003, c 63 <http://canlii.ca/t/52pq9>
- *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, <http://canlii.ca/t/53k1h>

Manitoba

- *Protection for Persons in Care Act*, CCSM, c P144 <http://canlii.ca/t/8gp4>
- *Vulnerable Persons Living with a Mental Disability Act*, CCSM c V90 <http://canlii.ca/t/8gnj>
- *The Domestic Violence and Stalking Act*, CCSM c D 93 <http://canlii.ca/t/8gkx>

New Brunswick

- *Family Services Act*, SNB 1980, c F-2.2 <http://canlii.ca/t/88bd>
- *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 <http://canlii.ca/t/8j1c>
- *Public Trustee Act*, SNB 2005 c P-26.5 <http://canlii.ca/t/888p>

Newfoundland

- *Adult Protection Act*, SNL 2001, c A-4.01 <http://canlii.ca/t/8pff>
- *Family Violence Protection Act*, SNL 2005, c.F-31 <http://canlii.ca/t/8b2k>

- *Personal Health Information Act*, SNL 2008 c P-7.01 <http://canlii.ca/t/89st>
- *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 <http://canlii.ca/t/89t5>

Nova Scotia

- *Adult Protection Act*, RSNS 1989, c 2 <http://canlii.ca/t/87m6>
- *Protection for Persons in Care Act*, SNS 2004 c 33 <http://canlii.ca/t/87gw>
- *Domestic Violence Intervention Act*, SNS 2001, c 29 <http://canlii.ca/t/87rr>

Ontario

- *Long-Term Care Homes Act*, SO 2007, c 8 <http://canlii.ca/t/34x>
- *Substitute Decisions Act*, 1992, SO 1992, c 30 <http://canlii.ca/t/2tq>
- *Health Care Consent Act*, 1996, SO 1996, c 30 Sch A <http://canlii.ca/t/2wh>
- *Mental Health Act*, 1990, RSO 1990 c M7 <http://canlii.ca/t/2k9>
- *Residential Tenancies Act*, SO 2006 c 17 <http://canlii.ca/t/33p>
- *Consumer Protection Act, 2002* SO 2002 c 30, Sch A <http://canlii.ca/t/31w>
- *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31 <http://canlii.ca/t/2d9>

Prince Edward Island

- *Adult Protection Act*, RSPEI 1988, c A-5 <http://canlii.ca/t/8d3b>
- *Victims of Family Violence Act*, RSPEI 1998, c V-3.2 <http://canlii.ca/t/8dcl>

Quebec

- Charter of Human Rights and Freedoms, CQLR c C-12, art 48 <http://canlii.ca/t/52t34>
- *Public Curator Act*, CQLR c C-81 <http://canlii.ca/t/53k4m>
- *Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR c A-2.1 <http://canlii.ca/t/535jc>
- *Act to Combat maltreatment of seniors and other persons of full age in vulnerable situations*, CQLR c L-6.3 <http://canlii.ca/t/53084>
- *Professional Code*, CQLR c C-26 <http://canlii.ca/t/53gh1>
- *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 <http://canlii.ca/t/52pw4>

Saskatchewan

- *Victims of Domestic Violence Act*, SS 1994, c V-6.02 <http://canlii.ca/t/wbh>
- *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 <http://canlii.ca/t/wts>

Yukon

- *Adult Protection and Decision Making Act*, SY 2003, c 21 Sch A
<http://canlii.ca/t/8j7t>
- *Family Violence Prevention Act*, RSY 2002, c 84 <http://canlii.ca/t/8jfp>
- *Public Guardian and Trustee Act*, SY 2003, c 21 Sch. C, Part 2
<http://canlii.ca/t/8lrs>

Nunavut

- *Family Abuse Intervention Act*, SNu 2006, c 18 <http://canlii.ca/t/8l4w>

Northwest Territories

- *Protection Against Family Violence Act*, SNWT 2003, c 2 <http://canlii.ca/t/8hvh>

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, Whaley Estate Litigation Partners

2019