FINANCIAL ABUSE OF THE OLDER ADULT: ARE WE DOING ENOUGH?

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Introduction*

The *Canadian Charter of Rights and Freedoms* (the "*Charter*") provides that every Canadian is entitled to equal protection and equal benefit of the law without discrimination.[1] There are many federal and provincial statutes in Canada that play a role, directly or indirectly, in protecting older adults from age-based discrimination. Statutory protections are a difficult balance to strike. Many of our statutes play a role in preventing the financial abuse and exploitation of older adults. Such statutes must accord with the provisions of the *Charter*. This monograph begins with a review of select criminal offences in the Canadian *Criminal Code* that can be utilized effectively in deterring and penalizing perpetrators and preventing the financial abuse and exploitation of older adults. We discuss the effectiveness of the *Criminal Code* in affording older adults equal protection of the law.

Other select statutes, and in particular those that fall within provincial jurisdiction, address issues arising from the legal construct of mental capacity. In Ontario, adults with compromised mental capacity – regardless of their age – are afforded the protection of the various substitute decision making schemes, such as, the *Substitute Decisions Act, 1992* ("SDA") and the *Health Care Consent Act*.[2] These statutes are fairly effective in ensuring that older adults enjoy equal protection under the law. Our

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 15, online at CanLII:< http://canlii.ca/t/ldsx >. Unless otherwise indicated, all statute and case law in this paper are cited to the Canadian Legal Information Institute ("CanLII"), a non-profit organization managed by the Federation of Law Societies of Canada. CanLII's goal is to make Canadian law accessible for free on the Internet.

[2] *Substitute Decisions Act*, 1992, S.O. 1992, C. 30 http://canlii.ca/t/10gb; *Health Care Consent Act* 1996, SO 1996, c 2, Sch A http://canlii.ca/t/kvc1 .

primary focus is on the SDA and whether the efficacy of some of its protective mechanisms could be improved.

The *Charter's* principles of equal benefit under the law ensure that adults with diminished capacity are able to partake in significant social institutions such as civil marriage. Unfortunately, as a result of the legislated financial consequences of civil marriage, some older adults with diminished capacity may be vulnerable to a form of financial abuse and exploitation perpetrated through civil marriage. We consider the unintended consequences of civil marriage.

We consider certain case studies all of which do not provide definitive answers, but rather facilitate consideration of the issues that give rise to financial abuse and exploitation of older adults with a view to identify possible trends in Canada. the analysis as a starting point may lead to more effective regimes for the prevention of financial abuse and exploitation of older adults in Canada.

Older Adults in Canada

The education, literacy and familial characteristics of Canada's older adults are relevant factors in our analysis of legislation and the ways in which it intersects with the lives of older adults.

Education levels have a close relationship with a number of indicators of wellbeing in older adults, including health and social isolation.[3] Social isolation is often a contributing factor in the incidents of exploitation and abuse of older adults. Rights and remedies afforded to older adults by statutes, regulations and policies require literacy as a pre-requisite to the enjoyment of the rights and liberties afforded to them by statute. A study conducted in 2003 found that over 80 percent of Canadians over the age of 65 had prose literacy levels considered to be below the desired threshold for coping well in a

[3] 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* (Toronto: April 2012) at page 33 ["LCO Report"] online at the LCO's website:< http://www.lco-cdo.org/en/older-adults-final-report >.

'*complex knowledge society*', as compared to roughly 40 percent of those aged 16-45, and approximately 45 percent of those aged 46-55.[4] Older women are more likely to have lower levels of educational attainment than their male contemporaries.[5]

To the extent that literacy levels may be informed by language, it is important to note that a portion of older Canadian adults speak either of Canada's two official languages, English and French, as a second language. In 2001, over one-quarter of persons aged 65-84 were immigrants.[6] It is unclear how many of those older immigrant adults are at a disadvantage in terms of their ability to navigate Canada's legal system. A recent study from Ontario acknowledged that older adults who are recent immigrants may be dependent upon their relatives to maintain legal status in the country, may not know an official language, and are less likely to have significant social networks on which they can rely.[7]

The notion of "family" in Canada is also a relevant factor in how we protect older adults from abuse and exploitation. As we age, we may become increasingly reliant on family members to assist us in exercising our independence and supporting our ability to make decisions about our lives. This reliance on family members can sometimes create issues, especially when that reliance is concurrent with an absence of connections to the broader community. Older adults may rely on family members to advise them of their rights. Older adults may be reluctant to complain about financial, emotional, physical or sexual abuse by family members on whom they are dependent on maintaining some level of independence and wellbeing.[8] These social factors and demographic characteristics raise issues that are particular to the effectiveness of some statutes; if a statute or its implementation is premised on the assumption that family members are always able and willing to protect their older relatives, it falls short of

[4] *Ibid.*
[5] *Ibid*. at p. 45.
[6] *Ibid.* at p. 46.
[7] *Ibid.*
[8] LCO Report, *supra* note 3 at p. 64.

affording equal protection to older adults, perhaps because, among other factors, this is simply not our social reality.

FEDERAL LAW: The Canadian Criminal Code[9]

Criminal law in Canada is drafted and enacted by federal parliament. The Canadian *Criminal Code* creates offences and provides guidance to the courts with respect to sentencing.[10]

The *Criminal Code* does not provide one specific offence relating to "elder abuse" or "elder financial abuse." Instead, the police have available to them various options under which a perpetrator of elder abuse could be charged, depending on the nature of the abuse including:

- Theft by a Person Holding a Power of Attorney (s. 331, CC);
- Theft (s. 322, CC);
- Criminal Breach of Trust (Conversion by Trustee) (s. 336, CC);
- Forgery (s. 366, CC);
- Extortion (s.346, CC);
- Fraud (ss. 386-388, CC); and
- Neglect: Failure to Provide the Necessaries of Life (s. 215, CC) and Criminal Negligence (s. 219, CC).

In Canada, judges have significant discretion with respect to the sentencing of individuals who are found to be guilty of crime. Judges are guided only by general principles in the *Criminal Code* and high maximum penalties.[11] The fundamental purpose of sentencing is to impose sanctions that meet a number of objectives,

[9] Portions of this section of this paper were previously published in Kimberly A. Whaley's *The Six-Minute Estates Lawyer, 2013,* Law Society of Upper Canada, (Toronto: 2013).
[10] Kent Roach, *Essentials of Canadian Criminal Law*, 3d ed (Toronto: Irwin Law Inc., 2004); *Criminal Code*, R.S.C., 1985, c. C-46.
[11] *Ibid*, p. 19.

including denouncing unlawful conduct and deterring the offender and other persons from committing offences.[12]

Courts also consider a wide range of aggravating and mitigating factors in determining the appropriate sentences, and some of the prescribed aggravating factors include evidence that the offence was motivated by age or mental disability, and evidence that the offender abused a position of trust or authority in relation to the victim.[13] The presence of these aggravating factors may result in an increased sentence. The recently enacted *Protection of Older Adults Act* expanded the Criminal Code and as such, the list of aggravating factors to specifically target offences against victims "*who are vulnerable due to their age and other personal circumstances*."[14]

Many of the criminal case studies referenced share a common fact: the criminal misuse of a Power of Attorney for Property. For the purpose of understanding the following case studies, it is sufficient to understand that an Attorney acting under a Continuing Power of Attorney for Property has the legal authority to manage another individual's finances.

CASE STUDIES: Criminal Cases

Theft by a Person Holding a Power of Attorney (s. 331, CC)

The full provision of s.331 of the Criminal Code reads:

> *s.331. Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.*

[12] *Criminal Code*, RSC 1985, c C-46, s 718 [*Criminal Code*] online at < http://canlii.ca/t/523m4 >.
[13] *Ibid*. at s. 718.2.
[14] *Protection of Older Adults Act* S.C. 2012, c. 29; Department of Justice, *Backgrounder: Protecting Canada's Seniors Act*, online:http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32826.html.

Interestingly, the only reported case that could be found regarding this section of the *Criminal Code* was the 2011 case of *R. v. Kaziuk.*[15] Interestingly, the accused was not even charged with a section 331 offence. Instead, the accused was charged under ss.322 and 368, relating to the regular theft and fraud provisions. Kaziuk had originally been charged under s.336 with committing a "*Criminal Breach of Trust*", Ultimately this charge was dismissed at the request of the Crown "*on the basis that the wrong section of the Criminal Code had been laid. The offence should have been laid under s. 331, theft by a person holding a Power of Attorney*."[16] At the conclusion of the trial Justice Baldwin "*found 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*".[17]

R. v. Kaziuk

Roman Kaziuk is the only child of Feliska Kaziuk who was 88 years old at the time of this trial in 2011. Mrs. Kaziuk's husband and Roman's father died in 2000. At this point, Mrs. Kaziuk was well off financially, owning three mortgage free properties including a residence in Miami, Florida as well as significant savings in her bank account of over one million dollars. At the end of this sad story, due to the actions of her son, Mrs. Kaziuk was living in a homeless shelter run by the Salvation Army without a penny to her name.

On November 7, 2006 Mrs. Kaziuk signed a Continuing Power of Attorney for Property naming Roman as her attorney. At the end of 2008, Roman's home was noted for being in arrears on mortgage payments so he obtained a $20,000.00 loan from a lawyer. As collateral for that loan, Roman used the POA to provide the lawyer with a mortgage on one of the properties owned by his mother. Evidence also showed he had placed other mortgages on her properties including one for $98,000.00 and another for $65,000.00, by using the POA.

[15] *R. v. Kaziuk*, 2011 ONCJ 851 [*Kaziuk*].
[16] *Ibid.* at para. 2.

The issue at trial was whether or not Mrs. Kaziuk gave her son permission to obtain the loans by putting mortgages on her properties. The Court held that the Crown had proven its case beyond a reasonable doubt.

Even though the Crown only sought a total sentence of 3-4 years incarceration, Justice Baldwin sentenced Kaziuk to the maximum 10 year sentence for the theft over $5000.00 and a concurrent 10 year sentence for the fraud charge. The Court looked at the circumstances of the victim and noted that in 2009 Mrs. Kaziuk had over one million dollars in her bank account, a car and credit cards. Due to the actions of her son, she no longer had a car, any money in her bank account or any credit cards because he took everything from her. On September 12, 2011 she was evicted from her condominium because of the fraudulent mortgages her son put on it and the banks seized her other properties. At the time of the sentencing decision she resided in a residence for homeless people run by the Salvation Army. However, through the efforts of the police officers concerned with Mrs. Kaziuk, the Office of the Public Guardian and Trustee have since become involved in Mrs. Kaziuk's case.[18]

In reviewing the circumstances of the offender, Justice Baldwin observed that he had a total of 69 convictions of crimes of dishonesty, including, fraud, theft, uttering forged documents etc. Justice Baldwin also found the following aggravating factors on sentencing:

- *"This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim."*[19]
- *"Not even the notorious fraudster Bernie Madoff was guilty of destroying his own mother as Mr. Kaziuk has repeatedly done."*[20]
- *"Mr. Kaziuk would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could."* [21]

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[17] *Kaziuk*, *supra* note 15, at ¶ 3.
[18] *Ibid.* at ¶ 51.
[19] *Ibid.* at ¶ 85.
[20] *Supra* note 15 at ¶ 101.

- *"Mrs. Kaziuk is homeless due to the offender's actions. He has wiped her out financially and broken her heart."*[22]
- *"In jail, this offender will be better off physically than his own Mother. He will be sheltered, fed regularly and kept warm."*[23]

Unfortunately, Justice Baldwin's sentence was reduced from 10 years to 8 on appeal, but in doing so the Court of Appeal observed, "*This was a case, however, that clearly called for an exemplary sentence. We agree with the trial judge's observations about the offender.*"[24] Regardless of the sentence reduction, the *Kaziuk* case is therefore a binding precedent for stern sentencing in cases involving theft and fraud perpetrated against an older, vulnerable adult. While the theft and fraud perpetrated against the accused's own mother in this case is severe, it is highly unlikely that this fact pattern is unique.

Theft (s. 322, CC)

R. v. Webb[25]

Terence Webb was charged with stealing a sum of money exceeding five thousand dollars contrary to s.322 of the *Criminal Code*. He was the 43 year-old nephew of the elderly victim, George Swan, and the would be sole surviving beneficiary of Mr. Swan's estate.

In February 2009 Webb obtained a Continuing Power of Attorney for Property ("CPOAP") over his uncle's affairs. Within a month Webb used the CPOAP to place Mr. Swan's residence in joint tenancy with Webb, and then shortly thereafter placed Mr. Swan in a private nursing home signing the contract as Mr. Swan's Attorney. The care home only received two payments from Webb. Webb then sold his uncle's house for

[21] *Ibid.* at ¶ 96.
[22] *Ibid.* at ¶ 89.
[23] *Ibid.* at ¶102.
[24] *R. v. Kaziuk,* 2013 ONCA 217 online at <http://canlii.ca/t/fwwzn>.
[25] *R. v. Webb*, 2011 SKPC 181.

$125,000.00 and at the same time removed the remaining amount of money Mr. Swan had in his bank accounts. Webb also took his uncle's pension and monthly government support cheques. After placing his uncle in the nursing home Webb had no more contact with him. According to a report dated May 7 2009 Mr. Swan was suffering from a severe form of chronic dementia likely due to Alzheimer's disease. Webb used the money he stole from his uncle to start up a "smoothie" business in British Columbia.

Mr. Swan was left with no money and the nursing home owner covered his personal care items (such as razors, haircuts and foot care) out of her own pocket. Eventually the nursing home owner notified the Office of the Public Guardian and Trustee ("PGT") and the PGT was appointed as Mr. Swan's guardian. The PGT commenced a civil lawsuit (no reported decision could be found) and the accused was charged with theft.

At the sentencing hearing the accused professed his love for his uncle and presented a cheque in court representing the balance of the entire amount stolen so that full restitution was made.

The Court imposed a sentence of 18 months with the first three months being house arrest the subsequent 15 months with a curfew and 100 hours of community service. The Court took the following factors into consideration in imposing this sentence:

- *The Court found that notwithstanding the mitigating factors, the term and conditions proposed by the prosecution and defence did not constitute "a fit and proper sentence" in this particular case and to accept it would have been contrary to the public interest;*
- *The accused was an attorney under a Power of Attorney and as such was in a position of trust vis-a-vis the victim;*
- *The victim was in a completely vulnerable state mentally incapable of attending to his own needs;*
- *The victim was left totally destitute by the accused without any means of support including even his OAP and CPP benefits;*

- *The theft was "calculated and ruthless and displayed an extremely callous disregard for the certain dire consequences that would follow for his hapless uncle";*
- *The sole motivation for the theft was "pure greed and avarice. . . clearly this was a crime of opportunity whereby the accused would have instant access to his uncle's funds rather than leaving this to chance as sole beneficiary of his estate; and*
- *Youth and elderly victims are the most vulnerable in our society and are deserving of our greatest vigilance and protection*.[26]

The Court also observed that had full restitution not been made actual jail time would have been the appropriate sentence.

Fraud (ss. 386-388, CC)

R. v. Chan[27]

A financial advisor named Jason Yiu-Kwan Chan pleaded guilty to certain counts under the *Securities Act,* R.S.A. 2000, c. S-4 for fraud, trading in a security when not registered and making a false statement. Chan admitted to defrauding multiple elderly clients of over $1 million.

His victims included a 70 year old woman who was visually impaired and an 83 year old woman who lived-in a care facility.

Five victim impact statements were filed at the sentencing hearing. The statements spoke "poignantly of the victim's loss of trust in others, depression, long-lasting financial hardships endured as the result of the loss of funds set aside for retirement, and lives

[26] *R. v. Webb* 2011 SKPC 181 at ¶ 12.
[27] *R. v. Chan*, 2012 ABPC 272.

significantly set off course by having to deal with the aftermath of Mr. Chan's offending conduct."[28]

While Chan was charged under the *Securities Act* and not the *Criminal Code of Canada*, Justice Fradsham observed that "the sentencing objectives in this case require a period of incarceration. Regulatory offences are designed to protect the public, and a sufficiently strong and persuasive message of general deterrence is required."[29]

Chan was sentenced to two years and nine months of incarceration and restitution was ordered.

R v. Taylor[30]

The case of *R. v. Taylor* is indicative of the Court's willingness to consider abuse of trust as an aggravating factor in sentencing. Ms. Dokaupe, now deceased, was a frail and elderly woman who suffered a number of physical challenges that limited her mobility. Between 2005 and 2007, she employed a caregiver and relied on that caregiver for all her daily needs.

In 2005, at the caregiver's suggestion, Ms. Dokaupe executed a power of attorney for property document in favour of the caregiver. Ms. Dokaupe also executed a new Will that appointed the caregiver as executor.

In 2006 the caregiver used the attorney for property document to obtain a bank card for Ms. Dokaupe's savings account. Between 2006 and 2007, the caregiver used that bank card to empty Ms. Dokaupe's savings account of over $126,000, leaving only $17,000.

The caregiver used that money for her own benefit.

[28] *Ibid.* at ¶ 5.
[29] *Ibid*. at ¶ 58.
[30] *R. v. Taylor*, 2012 ONCA 809 (CanLII).

In August of 2007 the caregiver left Ms. Dokaupe's employment. A new employee read Ms. Dokaupe's bank statements, told Ms. Dokaupe what she saw, and called the police. The police charged the caregiver with fraud. The police obtained expert reports confirming that Ms. Dokaupe was capable of managing her property throughout the period in question, and during her discussions with police. Unfortunately, Ms. Dokaupe died before the trial took place. In her absence, the Crown relied on Ms. Dokaupe's witness statements which had been recorded by the police. The judge accepted Mrs. Dokaupe's recorded statements and the expert's evidence. The caregiver was convicted and sentenced to 21 months in prison.

The caregiver appealed her conviction on the ground that Ms. Dokaupe's recorded statements were hearsay and should not have been admitted at trial. She also appealed her sentence on grounds that there were mitigating factors that should have reduced the severity of the sentence. For example, she had no previous record and submitted that she had been struggling with personal issues at the time of the withdrawals. In her view, a non-custodial sentence would be more appropriate.

In dismissing the appeal, Justice Rosenberg wrote:

> *[t]his 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.*

The Court dismissed the appeal from conviction; leave was granted to appeal the sentence but that appeal was also dismissed.

COMMENTARY ON CASE STUDIES

Many of our Criminal Code offences are triggered by the abuse and exploitation of older adults. Parliament defines offences broadly to capture behaviour of varying degrees of culpability, and wide discretion is afforded to judges in sentencing.[31] The principles of sentencing include deterrence, and sentences may be increased where there is evidence that the offender abused a position of trust, the victim was older, vulnerable, or had a mental or physical disability. To the extent that these cases reflect the prosecution of crimes perpetrated against older adults and to the extent that Courts seem to be prepared to use the sentencing principles as they were intended by Parliament, it seems the Criminal Code is an important tool in the prevention of abuse of older adults.

Notably however, many such cases involve the misuse of a legal document: the Continuing Power of Attorney for Property. An unfortunate consequence of this particular substitute decision making mechanism is that, for a number of reasons, financial mismanagement by an Attorney does not always attract criminal charges. The victim may have knowledge of, or agree to, the inappropriate expenditures of the Attorney. The victim may tell investigating police that they knew about and agreed to the expenditures in order to prevent the criminal prosecution of their loved one. In some cases where there is evidence that the older adult is incapable of managing their property, the police often decline to investigate at all on the basis that these issues are more appropriately dealt with as civil matters.

Such cases also suggest that the financial abuse and exploitation of older adults is often perpetrated by family members. Older adults tend to rely on increasingly on their family members as they age. That reliance can be heightened where the older adult has limitations in literacy and mobility, and where their family members hold a CPOAP. It follows that older adults who are being victimized by family members may be reluctant

[31] Roach, *supra* note 10, at p. 340.

to report the crime to the authorities if it could result in incarceration for their family member.

Having regard to all of the above considerations, the Canadian Criminal Code is apparently under-utilized, yet certainly can be effective.

PROVINCIAL LAW: Substitute Decision Making and Civil Marriage

A. Substitute Decision Making in Ontario

Ontario has several pieces of provincial legislation that are meant to play a role in protecting vulnerable people. Our focus is on the *Substitute Decisions Act, 1992* (the "SDA").[32] The SDA deals with, among other things, issues arising from compromised mental capacity. It provides a framework for identifying persons who are incapable of making certain kinds of decisions. It provides a process for implementing various forms of substitute decision making on behalf of individuals who meet the test for identifying incapacity.

It is instructive, in evaluating the efficacy of this statute, to examine the social and political context in which it was developed, as well as the intentions of the government responsible for drafting the statute. This approach gives us a sense of the history of substitute decision making in Canada and reveals the problems that this statute was designed to address. Examining how the statue was implemented is also, in this case, particularly instructive because it exposes the political pressures, doubts, and difficulties that emerged through legislative debate.

[32] *Supra* note 2.

i. Social and Political Context of the Development of Ontario's Substitute Decision Making Scheme

In Ontario, in or about the 1970s, individuals with mental illnesses and who otherwise suffer from impeded decision making capacity, were being discharged from the facilities that had, historically, housed them. This "de-institutionalization" represented a paradigm shift in Ontario's approach to mental health services wherein the focus of attention for mental health and social services began shifting away from residential care facilities.[33] As a result, there became a growing awareness among healthcare practitioners and social service providers that people with varying degrees of mental capacity were living in the community and required support.[34]

At the same time, there was a growing need, separate and apart from incidences of psychiatric illnesses, for individuals to plan for their future incapacity by appointing their own substitute decision makers. *The Powers of Attorney Act* permitted the appointment of Attorneys for Property, but that authority terminated if and when the grantor became incapable.[35] Legislative changes in 1979, 1983, and 1986 permitted a power of attorney document to survive subsequent mental incapacity and thereby permit individuals to start to preplan for incapacity, but it was still necessary to design a mechanism that addressed the needs of people who did not plan their powers of attorney in advance of incapacity. [36]

It was assumed that most people, if given the choice, would rely on family members to act as their future substitute decision makers. At the same time, it was understood that many people did not have family members who they could trust with this kind of substitute decision making authority. It was therefore necessary to ensure that a public safety net was available to provide substitute decision making in these circumstances.

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[33] Stephen V. Fram, *The Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons*, 1987, Executive Summary, page 5 ["Fram Report"].
[34] *Ibid*.
[35] *The Powers of Attorney Act*, RSO 1970, c. 357. For a critique of this statute, see the Report on Powers of Attorney published in 1972 by the Ontario Law Reform Commission, available online at the Osgoode Hall Law School Internet Archive: http://archive.org/details/reportonpowerso00onta.

ii. Intentions and Concerns of the Drafting Officials

In 1985, the Ontario government established an Advisory Committee to "review of all aspects of law governing and related to substitute decision making for persons who are mentally incapacitated and to recommend revision where appropriate."[37] The *Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons* (the "Fram Report") was completed in December of 1987. It included an early draft of what is now, many revisions later, the *Substitute Decisions Act, 1992*.

It was understood that many diverse groups could be affected by the Committee's recommendations and draft legislation, so its Members were nominated by a number of public and private stakeholders on the basis of their ability to represent the stakeholders' interests.[38] Older adults were a key demographic of concerns to the Committee, and several Members were nominated for the specific purpose of representing the views and interests of older adults.[39]

Given that the Committee's recommendations would eventually become legislated substitute decision making, they were sensitive to the potential erosion of the rights of incapable people under the auspices of such substitute decision making. They summarized their concern in this way:

> *Substitute decision making can be viewed either as a positive good … or, as a necessary evil …. This committee has adopted the latter view. … The history of our choices made on behalf of physically or mentally handicapped people demonstrates the effects of paternalism. The first two values underlying this report, namely no unnecessary intervention and self-*

[36] Ontario Legislative Assembly, Standing Committee on the Administration of Justice, February 5, 1996.
[37] Fram Report, *supra* note 33, pp. v and vii.
[38] *Ibid.*, p. v.
[39] *Ibid.*, p. viii – represented groups include by the Advocacy Centre for the Elderly, the Ontario Advisory Council on Senior Citizens, the Alzheimer Society for Metropolitan Toronto and the Office for Senior Citizens' Affairs.

> *determination, are aimed at assuring this history is neither continued nor repeated.*[40]

Accordingly, the Committee made a number of specific recommendations with the intention of reducing the ways in which substitute decision making powers could be abused, and increasing accountability of substitute decision makers. For example, it recommended that attorneys for property and guardians of property be required to account, on an annual basis, to the incapable person whose property they were managing.[41] The Committee was of the view that the existing legislation that prescribed an accounting process for Estate Executors and Trustees was unnecessarily onerous, so it recommended a simplified procedure for the annual financial reporting of attorneys and guardians.[42] The Committee was also aware of the potential for privacy violations if the attorney's annual financial report was issued to incapable people living in facilities or to incapable people who were otherwise unable to take steps to protect their own privacy.[43] As such, the Committee drafted a proposal that would ensure the availability of a simplified financial report on an annual basis to any incapable person who was able to request it.[44]

The Committee recommended that the existing Public Trustee's office should be combined with a new Public Guardian's office. The new office would have a mandate to apply to court for guardianship; act as a substitute decision maker of last resort; and have supervisory responsibilities over attorneys for personal care and private guardians.[45]

The Committee also anticipated that disputes could arise in the course of the exercise of one's duties as an attorney or guardian, so they recommended that the Public Guardian take an active role in mediating "disputes between private parties that arise

[40] Fram Report, *supra* note 33, p. 42.
[41] *Ibid*., p. 232 – 234.
[42] *Ibid*., p. 232 – 234.
[43] *Ibid*., p. 233.
[44] *Ibid*., p. 232 – 234.
[45] *Ibid*., p. 11.

under the legislation."[46] The Committee was of the view that it would not be appropriate in most cases for disputes of this nature to be addressed in the expensive and adversarial court system.[47]

iii. Implementation

The *Substitute Decisions Act, 1992* was the Ontario government's response to the Fram Report.[48] The SDA was introduced in 1991 as part of a series of statutes that addressed issues of capacity and decision making in the health care context and elsewhere. The statutes were proclaimed on April 3, 1995 with unanimous support of the provincial legislature.[49] However, in June of 1995, provincial elections saw a shift in political priorities, and the new provincial government introduced a Bill intended to, among other things, simplify the rules for making and using powers of attorney.[50] It did away with the recommended mandatory financial reporting and amended the SDA to simply require attorneys to keep good records. Currently, the regulations require those records to be in the same form of that required of Estate Executors and Trustees. Pursuant to the SDA, if an incapable person wants to assert their right to compel their attorney or guardian to subject their accounts to judicial scrutiny, they must seek that relief by initiating court proceedings.[51]

With respect to the requirement that the OPGT mediate disputes arising during the course of substitute decision making, that provision was narrowed in scope. The Fram Report had recommended that the PGT be mandated to mediate disputes arising between attorneys for personal care and attorneys for property, as well as any other

[46] Fram Report, *supra* note 33 at pp. 14 and 69.
[47] *Ibid.*, p. 296.
[48] Ontario Legislative Assembly, Standing Committee on the Administration of Justice, February 5, 1996 at 1640.
[49] *Advocacy Act*, *1992,* SO 1992, C. 26; *Substitute Decisions Act*, *1992,* SO 1992 C. 30; *Consent to Treatment Act*, *1992*, SO 1992, C. 32.
[50] Bill 19, *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act*, 1st Sess, 36th Leg, 1996 (assented to on March 28, 1996) SO 1996, c. 2; Ontario Legislative Assembly, Standing Committee on the Administration of Justice, Submissions of the Attorney General, Honourable Charles Harnick, February 5, 1996.
[51] SDA s. 42(3).

disputes that may arise during the course of their duties.[52] The SDA as amended merely states that the PGT *can* mediate disputes between joint attorneys or between attorneys for personal care and attorneys for property.[53] Incapable people and their attorneys are otherwise left to initiate court proceedings in the event that a dispute arises in the course of the management of the incapable person's property.

While one could argue that many of the protective mechanisms were eroded or repealed during the early days of the SDA, it nevertheless still includes numerous measures to protect decision making autonomy and the rights of people who have been declared incapable.

iv. The Substitute Decisions Act, 1992

The SDA, addresses two over-arching areas of incapacity: incapacity with respect to financial decisions (referred to as "property" in the *SDA*), and incapacity with respect to personal care decisions. An individual is incapable of managing property, according to the SDA, if he or she is "*not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.*"[54]

The SDA provides a number of mechanisms for determining whether an individual is incapable of managing property. For example, a capacity assessor – someone who is part of a class of professionals designated by the SDA as being qualified to make determinations of capacity – may issue a certificate of incapacity, which triggers the statutory property guardianship mechanisms discussed in more detail below.[55] In the alternative, individuals who meet prescribed criteria are permitted by the SDA to commence court proceedings to obtain a declaration that an individual is incapable of

[52] Fram Report, *supra* note 33, pp. 14 and 69.
[53] SDA s. 88.
[54] SDA, s. 6.
[55] SDA ss. 16(1),(3).

managing his or her property, and to obtain court-appointment as guardian of that person's property.[56] In this instance, the applicant or proposed guardian will be required to provide evidence of the individual's incapacity in order to obtain the necessary declaration of incapacity, and there are rules and case law that set the parameters of the form and content of that evidence.[57]

The SDA provides two general mechanisms of substitute decision making on behalf of incapable adults with respect to property: attorneyship and guardianship. Attorneyship under the SDA refers to the appointment of a capable adult to make decisions on a person's behalf in the event that they become incapable in the future.[58] This appointment is effected by executing a CPOAP. The *SDA* specifies the requisite capacity for granting this authority, and it prescribes a number of validity requirements.[59] The *SDA* also provides rules for how this decision-making authority is to be exercised.

The other mechanism for triggering substitute decision making with respect to property is through guardianship. Guardianship of the property is established in two ways: by operation of statute (statutory guardianship) or by court order (court-appointed guardianship). Statutory guardianship is triggered by the issuing of a certificate of incapacity by a capacity assessor, and it results in the appointment of PGT as the guardian of property of the incapable adult. If, after this statutory guardianship has been established, someone comes forward holding a valid CPOAP of the incapable person, the PGT's guardianship is terminated. In the alternative, guardianship may be court-ordered.

In either circumstance, in attorneyship or guardianship, the *SDA* provides guidelines that govern the exercise of the substitute decision making authority.

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[56] SDA ss. 24(1), 57(3), 69.
[57] SDA ss. 25(1), 58(1).
[58] Other statutes permit other forms of attorneyship. See, for example, Ontario's *Powers of Attorney Act*, RSO 1990, c P.20.
[59] SDA ss. 8(1), 9, 10.

The protection of an incapable person's autonomy was an overarching in the development of the *SDA*. A few examples are worth mentioning before we consider the litigation that arises from the misuse of attorneyship.

The *SDA* is based on an overriding presumption of capacity; it adopts the longstanding common law *view that all persons are deemed capable of making decisions at law.*[60] In defining decisional capacity, the *SDA* is focused solely on decision making *capacity*, and is not concerned with the *content* of decisions. Our courts affirmed this approach in the oft-repeated quote from Justice Quinn: "*The right to be foolish is an incident of living in a free and democratic society*."[61] In almost all circumstances, a capacity assessor must explain to the person being assessed, before performing the assessment: the purpose of the assessment, the consequences of a finding of incapacity, the person's right to refuse the assessment. [62] Individuals who have been declared incapable of managing property under the *SDA* by a doctor or a capacity assessor may challenge that determination by initiating a hearing before the Consent and Capacity Board (the "CCB"), which tribunal isaddressed in the commentary on the case studies below.

Once a determination has been made with respect to an individual's capacity, that individual is nevertheless entitled to continue to be involved in the decisions made on his/her behalf. The Substitute Decision Maker's (SDM's) role is not to usurp total control and authority, but rather to foster autonomy. For example, attorneys for property are required to include the incapable person in decisions about their property, and are required to consult from time to time with the incapable person's supportive family members and friends.[63] The powers and duties of attorneys for property must be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.[64] This concept of good faith is an important one. Attorneys who are liable for their breach of duty, for example, may be saved from that liability if the

[60] SDA s. 2(1).
[61] Quinn J. in *R. v. Koch* (1997), 33 OR (3d) 485 (Gen. Div.).
[62] SDA s. 78.
[63] SDA ss. 32(3), (5); 66(5)-(7).
[64] SDA s. 32(1).

breach arose while the attorney or guardian was acting with honesty, diligence and good faith.[65] Attorneys must keep accounts of all transactions involving the incapable person's property.[66]

There is an important distinction between the reporting requirements for guardians of property, who are appointed by the court, and attorneys for property, who are appointed by capable adults in advance of incapacity. Upon the appointment of a guardian of property, courts usually order the guardian to pass his or her accounts every few years. There is no such protection afforded to incapable people who have their property managed by attorneys under the *SDA*.

Finally, the *SDA* provides mechanisms for addressing issues that arise in the course of the management of an individual's property. For example, the attorney may apply to the court for advice and directions on any matter affecting the management of property.[67] In addition, the court may, on an application brought by the incapable person or other prescribed individuals, order the attorney for property to pass their accounts.[68]

In conclusion, the SDA sets out the criteria for determining whether an individual lacks capacity in either of the separate and exclusive realms of property or personal care. It provides a number of different substitute decision making mechanisms in circumstances where an individual is identified as incapable of managing their property or personal care, and it governs the exercise of that decision making authority.

Unfortunately, the case law reviewed below suggests that there is a disconnect between the protective mechanisms provided for under the *SDA* and the actions fiduciaries acting as attorneys and/or guardians. While it may be true that grantors may prefer, if given a choice, to appoint family members as their attorneys for property, it seems that

[65] SDA ss 32 and 38.
[66] SDA s. 32(6).
[67] SDA s. 39(1).
[68] SDA s. 42(1) – (4).

this approach is not always the best choice. The provisions of the *SDA* do not appear to be effective in the absence of regular reporting such requirements by fiduciaries.

CASE STUDIES: Misuse of the Power of Attorney for Property

Nguyen-Crawford v. Nguyen[69]

In this case, a woman, whose primary language was Vietnamese, executed powers of attorney appointing her daughter. The daughter, who was present in the lawyer's office during the process, translated the executing documents into Vietnamese for her mother. Two years later, when it became apparent that the daughter was misappropriating her mother's money, the daughter's siblings sought a declaration that the powers of attorney were invalid on the basis that the daughter had obtained the substitute decision making authority through undue influence. Specifically, the mother lived with the daughter and was substantially dependent on her.

The court held that the powers of attorney were of no force and effect.

In the Court's view, the presumption of capacity to execute the documents was rebutted by the evidence which showed that the daughter exercised undue influence over her mother at the time. Interestingly, the evidence of undue influence was: a) the mother was dependent upon her daughter; b) the daughter provided the only translation of the drafting solicitor's legal advice and the power of attorney documents themselves; and, somewhat perplexingly, c) the daughter and her husband used the mother's funds as if they were their own. This latter point is peculiar given that the misappropriation of the mother's funds was not contemporaneous with the execution of the power of attorney documents, but took place two years later.

[69] *Nguyen-Crawford v. Nguyen*, 2010 CarswellOnt 9492 (Ont. S.C.J.)

Johnson v. Huchkewich[70]

The case of *Johnson v. Huchkewich* involved a similar set of facts as that of *Nguyen-Crawford v. Nguyen*. In *Johnson v. Huchkewich*, one of the widows' two daughters invited her mother to stay with her while the mother's home was being painted. What ensued was described by the Court as "*a disgraceful tug-of-war over [the widow], clearly motivated by [the daughter's] desire to obtain some or all of [the widow's] assets*". During this brief visit, the daughter took her mother to a lawyer and had her execute powers of attorney for personal care and for property in her favour. Not only did the daughter instruct the lawyer, with her mother present, but the daughter explained the document to her mother in Polish; and no one else in the room understood Polish.

Shortly after that, and as stated by the Court "before the ink had dried", the daughter used the power of attorney to transfer $200,000 from the joint account in her mother's and other sister's names into her own account. Fortunately, the justice system intervened, but not without the attendant costs, and a number of orders were made against the attorney/daughter, including:

- An order that she return of the $200,000 to the joint bank account;
- An order that the other sister/daughter be appointed as guardian of the widow's property and personal care and that the widow would reside with that daughter and her family; and, among other things,
- An order restraining the attorney/daughter from harassing and annoying her sister/the appointed guardian.

Zimmerman v. McMichael Estate[71]

The McMichael's were husband and wife, and founders of the extensive Canadian art collection (the McMichael Collection) donated to the province of Ontario in 1966. In 2001, the couple executed mirror Wills that appointed the other as sole executors of

[70] *Johnson v. Huchkewich,* 2010 CarswellOnt 8157 (S.C.J.).

their estates. The Wills left the entire estate to the surviving spouse, but if there was no surviving spouse, the residue of the estate was to go to the McMichael Collection after five bequests of $50,000 were made.

The husband died on November 2003 when Mrs. McMichael was 81 years old. The night of her husband's death, a friend of the couple Mr. Zimmerman, who was a lawyer, took Mrs. McMichael to his parents' house to console her and had her sign power of attorney documents appointing himself as her sole attorney.

Although Mrs. McMichael continued to live in the matrimonial home for a short time after her husband's death, she was frail and required constant nursing assistance. She had no immediate family and her closest relative was her niece, who lived in a city 6 hours away. By mid-January 2004, her health deteriorated to the point that she could no longer remain in her home and was moved to a seniors' residence.

In January and February 2004, Mr. Zimmerman had a trust deed prepared which contemplated that the trustee would settle a trust of Mrs. McMichael's property. Mr. Zimmerman was appointed the sole trustee. Mrs. McMichael executed a deed creating the trust and authorized that all property be transferred to the trust except for $250,000 which was held back to satisfy the bequests in her Will. The trust deed contained terms that differed from Will, including a provision that on Mrs. McMichael's death the property was to be retained for 21 years rather than immediately being distributed to the McMichael Collection.

Mrs. McMichael died in July of 2007. Her niece and her husband were granted a Certificate of Appointment of Estate Trustee With Will. They brought an application for a declaration that the power of attorney and the trust were void, and an order that required Mr. Zimmerman to account for his dealings with the trust property.

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[71] *Zimmerman v. McMichael Estate*, 2010 ONSC 3855

Mr. Zimmerman was ordered to his pass accounts, but failed to do so and was removed as trustee on March 9, 2009. When he did eventually apply to ass his accounts, the niece and her husband made many objections to which Mr. Zimmerman failed to respond. During the hearing, the Court found that the accounts presented and sworn to by Mr. Zimmerman in his affidavit were inadequate, incomplete and in many respects false. It was found that Mr. Zimmerman had pre-taken compensation to cover such things as expensive dinners after – not during – his visits with Mrs. McMichael, new clothing, limousines, sailing trips to Bermuda, and trips to New York. It was also found that he had used Mrs. McMichael's BMW, charging any/all expenses to her trusts, and had taken her expensive art collection to adorn the walls of his own home. He did not explain how such expenses could have been related to the discharge of Mr. Zimmerman's duties to Mrs. McMichael, as is required by the *SDA*.

Although the court ordered that the hearing should continue in order to give Mr. Zimmerman a final chance to respond to the notices of objection concerning the disbursements he made out of trust property, he failed to do so. The court concluded that he was not entitled to compensation for his services as an attorney or a trustee and was required to repay the amounts that he had pre-taken by way of compensation, in the total amount of $356,462.50 CDN and $85,400.00, US, together with prejudgment interest from the date of each taking. He was also required to repay the sum of $34,064.55 to Reynolds Accounting Services for the preparation of accounts, among other reimbursements. He was also ordered to repay over $390,000.00 in items disbursed from the trust for which he failed to provide an explanation. In addition, in a separate hearing on costs, the court found that, as Mr. Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers, he should pay all costs involved in getting to the truth. Finally, Mr. Zimmerman was ordered to pay over $280,000.00 in full indemnity legal costs. In the end, Mr. Zimmerman was ordered to pay over $1 million in total. Just a few short months after the last order was made, Mr. Zimmerman died.

McMaster v. McMaster[72]

In 1994 Mary granted powers of attorney to her two sons, Graeme and Malcolm. At the time, Mary was 80 years old and in good health. She was also affluent – she owned approximately $5 million in assets in addition to her home and cottage.

In 1994 Mary's son Malcolm started managing her financial affairs. Graeme did not know he was named as a joint attorney for property with Malcolm, and neither Mary nor Malcolm informed him of his joint role.

In 2002 Mary and her sons incorporated a family business with a net worth of $2 million. Between 2002 and 2009, Mary's symptoms of forgetfulness progressed to late stage Alzheimers.

In 2004, Malcolm transferred significant funds from the family corporation to a corporation controlled by himself. He invested those funds in another enterprise, which floundered, and then he used more of Mary's money to sue the floundering enterprise. In 2006 Malcolm used Mary's funds to purchase, through his own company, a building for $300,000 which he renovated and sold for $500,000 in 2012.

In 2012 Malcolm took steps to obtain a mortgage on Mary's house. Graeme objected to Malcolm's plans in this regard, and in the course of his communication with his Malcolm he found out for the first time he was a co-attorney for property for Mary. That same year, 2012, Mary's accountant informed both brothers that Mary's personal and corporate taxes had not been filed since 2008 and the family corporation had an outstanding line of credit in the amount of $65,000.

The court did not make a finding as to whether Mary was capable of managing her property since 2000, although there was evidence to suggest that capacity was an issue. Instead, the court found that:

[72] *McMaster v. McMaster*, 2013 ONSC 1115.

> *Mary 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 concept of parens patriae can be relied upon by the court to critically assess … the stewardship of Malcolm.*[73]
>
> …
>
> *The fiscal stewardship of Malcolm 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*.[74]

Malcolm was removed as attorney for property, and at the time of writing, the litigation is ongoing.

COMMENTARY ON CASE STUDIES

The SDA was carefully crafted to protect individuals who meet the *SDA* factors or criteria for determining decisional capacity, and to permit such individuals to effect advance planning initiatives by granting CPOAP's. To the extent that statutory mechanisms exist in the *SDA* to ensure that cognitively compromised persons may benefit from the assistance of substitute decision makers, and to the extent that those powers of substitute decision making are subject to rules and regulations, the *SDA* plays a role in affording protection to vulnerable older adults.

That said, there are obvious limits to the protections afforded to cognitively compromised individuals via the CPOAP model of substitute decision making.[75] Interestingly, some of the apparent limitations in the *SDA's* effectiveness in this regard may not be conceptual flaws. Rather, many of the apparent limitations may well have

[73] *McMaster* at ¶ 56.
[74] *McMaster* at ¶ 63.
[75] See also LCO Report, *supra* note 3, at p. 236.

arisen from the lack of public or political will to implement all of the recommendations put forth in the Fram Report.[76]

For example, the absence of mandatory financial reporting on the part of attorneys may have played a role in the financial abuse perpetrated by the attorneys in the above cases. This issue is not particular to Ontario; the Alberta Law Reform Institute recommends strengthening the transparency and accountability of attorneys for property in part by mandating additional safeguards.[77] It is not clear whether the mandatory provision of annual financial statements by attorneys as contemplated in the Fram Report would have served as a deterrent to the perpetrators, but at the very least such reports, if provided, could have shed light on problems earlier, and may have expedited the evidentiary process in the subsequent court proceedings.

In almost every case referenced within, the financial abuse was perpetrated by a family member. It is clear from the legislation and the parliamentary debates that the government assumed family members could and would fulfill their attorneyship duties and obligations. This assumption about the integrity of any and all family members does not appear to be universally held. For example, the Fram Report was quite blunt in its concerns about covetousness of family and friends, and the tendency among those whom have no affection for the incapable person to treat them as though they are dead.[78] For this reason, the Report devotes several pages to determining how best to implement mandatory financial reporting for attorneys and guardians while at the same time, ensuring the privacy and financial affairs of incapable adults are protected.[79] The Courts seem to be similarly wary of the potential for some family members to run astray of the SDA's rules. When Judges appoint family members as guardians, those court orders routinely include a requirement that the guardians pass their accounts every two to three years. The need for mandated accountability is apparent.

[76] See, for example, Lightman and Aviram, *Too Much, Too Late: the Advocacy Act in Ontario*, Law & Policy, Vol 22, No 1, January 2000.
[77] Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse" (2003) as cited in the LCO Report, *supra* note 3, at p. 236.
[78] Fram Report, *supra* note 33, p. 235.

The cases suggest that there is an implementation gap between the protections afforded to people under the *SDA,* and the ability of some older adults to access and understand their rights. For example, we know that many older adults rely on their family members to provide them with assistance as attorneys for property. We also know that many older adults in Canada have a lower than average literacy rate and may not read or write English or French. Some of the cases in this paper reveal the ways in which language and dependence on family members create risks that may be heightened by the attorneyship mechanisms of the *SDA*. Financial literacy is yet another increasingly apparent issue.

Finally, the availability of a broader mediation service may not prevent the financial abuse and exploitation of older adults, but it could certainly help alleviate the expense and damage to familial relationships caused by seeking redress through civil litigation. Once again, the narrow scope of the mediation provisions under the *SDA* was not a conceptual flaw, but appears to have resulted from a lack of political will to implement a broader mediation service.

Families involved in these types of disputes would arguably also benefit from a specialized board or tribunal with a mandate to quickly and cost-effectively resolve disputes arising under the *SDA*. Ontario has, in the Consent and Capacity Board ("CCB"), an excellent example of the expertise and efficiency that can be brought to bear in capacity related disputes. The CCB however has a limited mandate. Given the current volume of power of attorney litigation, and contested guardianship disputes, consideration of a specialized tribunal of sorts may be in order.

The CCB is an independent provincial tribunal that adjudicates issues of capacity, consent, civil committal and substitute decision making, most of which arise under other statutes not discussed in this paper.[80] Currently, issues arising under the *SDA* fall within

[79] Fram Report, *supra* note 33, p. 232 to 235.
[80] CCB's website, http://www.ccboard.on.ca/scripts/english/aboutus/index.asp, accessed on September 5, 2013.

the jurisdiction of the Ontario Superior Court of Justice. Civil courts can be effective in prosecuting breaches of trust, and have signalled their willingness to order custodial sentences where necessary.[81] Notably, such cases can take years and not all assets under management or scrutiny or of a value proportionate to the resources required to remedy the abuse. This form of justice may be out of reach for many older adults who cannot afford to fund litigation.

The *SDA* was ground breaking in its accomplishments with respect to protecting the interests of vulnerable adults, and it goes a fair distance in protecting older adults from financial abuse and exploitation. However, twenty years after the SDA was enacted, we now have a fairly robust body of reported cases that suggest that some models of substitute decision making may be more vulnerable to misuse than others – but in either case, the regime is not satisfactory.

B. Civil Marriage and its Statutory Consequences[82]

In societies around the world, marriage is a staple of social organization. In Canada, our Courts have held that marriage is one of the most significant forms of personal relationships, and the public recognition and sanction of marriage reflects society's support of the hopes, desires and aspirations that underlie committed conjugal relationships.[83] It is understood in Canadian law that the ability to marry enhances one's sense of dignity and self-worth. Accordingly, our Courts have recently changed the

[81] See, for example, the *Estate of Paul Penna*, 2010 ONSC 4730, wherein Justice Greer sentenced an Estate Trustee to 14 months incarceration for contempt of court as a result of his failure to, among other things, commence an application, pursuant to a previous court order, to pass his accounts for the assets he managed – estimated to be worth over one million dollars – pursuant to a previous court order.

[82] Most of this section was published previously in a paper titled, "Predatory Marriages: Its Consequences and Costs in Capacity Proceedings," delivered by Kimberly Whaley at the 2013 Annual National Initiative for the Care of the Elderly (NICE) Knowledge Exchange in Toronto. See also the LCO Report, *supra* note 3, at p. 138 – 139.
Also see: "*Capacity to Marry and the Estate Plan*", by Kimberly Whaley, Michel Silberfeld, Heather McGee, Helena Likwornik, Canada Law Book

[83] *Halpern v. Attorney General (Canada)*, 2003 CanLII 26403 at 5 (ONCA) ["*Halpern*"].

definition of marriage because it had historically presented a discriminatory bar to same sex couples, and was therefore a violation of s. 15 *Charter* rights.[84]

Given the societal and legal import of the institution of marriage, it is disheartening to find that civil marriage can sometimes be used by unscrupulous individuals to financial exploit and abuse older adults with diminished capacity. We call this phenomenon "predatory marriages," and we see these cases with increasing frequency in our litigation practice. The window of opportunity afforded to these predators arises from the intersection of several pieces of legislation and a common law definition of capacity. As a result, any attempt to prevent this particular form of financial exploitation and abuse of older adults will require a nuanced, multi-faceted approach.

Legislation in Ontario that governs the licensing and solemnization of marriage is the *Marriage Act*.[85] The *Marriage Act* prohibits officials from issuing marriage licenses to, or solemnizing the marriage of "any person who, based on what he or she knows or has reasonable grounds to believe, *lacks mental capacity* to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason.*"[*emphasis added*] [86]

The *Marriage Act* is silent with respect to the test for "lack of mental capacity," so the definition of mental capacity as it pertains to marriage is a developing area of common law. The historical and traditional English view is that the capacity required to marry is analogous to the capacity required to enter into a contract. As a result, according to this view, in order to be deemed capable of entering into a marriage, a person must have:

(a) The ability to understand the nature of the contract of marriage; and

(b) The ability to understand the effect of the contract of marriage.[87]

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[84] *Ibid*. at ¶ 155.
[85] *Marriage Act* R.S.O. 1990, c. M.3.
[86] *Ibid*. at s. 7.
[87] Kimberly Whaley et. al, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70 [hereinafter "*Capacity to Marry and the Estate Plan"*].

In this traditional view, spouses are required to understand only the most basic components of marriage, such as the commitment of the spouses to be exclusive, that the relationship is to be terminated only upon death, and that the marriage is to be founded on mutual support and cohabitation.

However, in Ontario there are a number of significant statutory consequences to civil marriage which could not have been contemplated in the development of the above-stated historical view of capacity to marry because the relevant statutes are – relatively speaking – new. For example, marriage automatically revokes a Will pursuant to section 15 of the *Succession Law Reform Act*, (the "SLRA"), and the exceptions thereto as set out at section 16 of the SLRA.[88] In addition, Ontario's *Family Law Act*, (the "FLA"), provides that, on marriage breakdown or death, the spouse whose "net family property" is the lesser of the two net family properties is entitled to an equalization payment of one-half the difference between them.[89] Defining and calculating "net family property" is complicated, but for the purpose of this paper it is sufficient to understand that net family property is the value of all of a spouse's property (except for certain exclusions and deductions) that a spouse owns on the valuation date (which could be the date of divorce, or date of death of a spouse). It is also important to note that the definition of property in the *FLA* is fairly vast: "any interest, present or future, vested or contingent, in real or personal property."

Such entitlements to the assets of one's spouse do not terminate on death. Rather, where one spouse dies leaving a Will, marital status bestows upon the surviving spouse the right to accept the terms of their deceased's spouse Will, or to receive an equalization payment under the FLA. Even if a spouse dies without a Will, as would be the case if the couple recently married and a new Will has not yet been drafted, or if the spouse with assets lacks the capacity to execute a new Will, the surviving spouse will nevertheless have access to a significant share of their deceased's spouse's assets. In the absence of a Will, the surviving spouse can either accept the operation of the

[88] *Succession Law Reform Act,* R.S.O. 1990, c. S.26 ["SLRA"].
[89] *Family Law Act,* R.S.O. 1990, c. F.3, s. 5 ["FLA"]

intestacy laws in the *SLRA*, or chose to receive an equalization payment under the *FLA*. The intestacy laws in the SLRA are generous to spouses; where the deceased intestate spouse leaves property worth more than "$200,000" and is survived by a spouse and children, the surviving spouse is entitled to take the first $200,000, and any remaining property is split between the spouse and the children.

There are legitimate policy reasons underlying this statutorily-imposed wealth-sharing regime which have developed over time. The FLA sets out its underlying policy rationale for the division of marital property as follows:

> *The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection*[90]

This policy rationale is clearly informed by notions about the nature of spousal relationships, just as the SDA was informed by notions and assumptions about family.

To the extent that these notions and assumptions are not always accurate, the FLA, like the SLRA can give rise to incidences of abuse and exploitation.

In general, to be found capable of marrying according to historical common law, a person need not have the ability to understand the more serious financial implications that accompany marriage, such as revocation of previous Wills, support obligations, and potential equalization. [91] In Canada, at one end of the judicial spectrum, there is the view that marriage is but a mere contract, and a simple one at that; and on the other end of the spectrum, however, several courts have espoused the view that the

[90] FLA s. 5(7).
[91] *Capacity to Marry and the Estate Plan*, *supra* note 88 at p. 50.

requirement to marry is not so simple; rather, one must be capable of managing one's person or one's property in order to enter into a valid marriage.

Common law decisions illustrate the ways in which marriage can precipitate the financial exploitation of older adults.

CASE STUDIES: Abuse of Vulnerable Adults Through Civil Marriage

Hart v. Cooper

The case of *Hart v. Cooper* involved a 76 year old man, Mr. Smiglicki, who married a woman 18 years his junior: Ms. Hart. The couple married by way of a civil marriage ceremony. As is generally the case, Mr. Smiglicki's marriage to Ms. Hart automatically revoked a will he had made six years prior, which named his three children as the beneficiaries of his Estate. Mr. Smiglicki had made this will after learning that he had a terminal illness and little more than a month to live.

Mr. Smiglicki's children challenged the validity of his marriage to Ms. Hart on the ground that Mr. Smiglicki lacked the mental incapacity to contract a marriage. Allegations were also made of alienation by Ms. Hart of Mr. Smiglicki.

The court in this case did not accept the medical evidence of Mr. Smiglicki's incapacity and concluded that the burden of proof borne by the three children had not been discharged. Additionally, the court found that Ms. Hart's motivation in marrying Mr. Smiglicki was not otherwise relevant to the determination of his mental state at the time of the marriage ceremony. Accordingly, the marriage was upheld as valid, and the will previously executed remained revoked.

Thus, in a consistent application of the historical case law, *Hart v. Cooper* confirms the age-old principle that the contract of marriage is a simple one.

Banton v. Banton[92]

When Mr. Banton was 84 years old, he made a will leaving his property equally amongst his five children. Shortly thereafter, Mr. Banton moved into a retirement home. Within a year of moving into a retirement home, he met Muna Yassin, a 31-year old waitress who worked in the retirement home's restaurant. At this time, Mr. Banton was terminally ill with prostate cancer. He was also, by all accounts, depressed. Additionally, he was in a weakened physical state as he required a walker and was incontinent.

Yet, in 1994, at 88 years of age, Mr. Banton married Ms. Yassin at her apartment. Two days after the marriage, he and Ms. Yassin met with a solicitor who was instructed to prepare a Power of Attorney in favour of Muna Yassin, and a will, leaving all of Mr. Banton's property to Ms. Yassin. Identical planning documents were later prepared after an assessment of Mr. Banton's capacity to manage his property and to grant a Power of Attorney. However, in 1995, and shortly after the new identical documents were prepared, a further capacity assessment was preformed, which found Mr. Banton incapable of managing property, but capable with respect to personal care. Mr. Banton died in 1996.

Mr. Banton's children raised a number of issues before the Court, including whether Mr. Banton had capacity to enter into marriage with Ms. Yassin.

Justice Cullity found that Mr. Banton had the capacity to marry.

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and, ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion

[92] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at ¶ 244.

under the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."[93]

Justice Cullity then embarked upon an analysis of the test for capacity to marry and whether Mr. Banton passed this test. The Court commenced its analysis with the "well-established" presumption that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves.[94] In the Court's view, however, the test is not one which is particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before his marriage to Ms. Yassin and despite his weakened mental condition, the Court found that Mr. Banton had sufficient memory and understanding to continue to appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry."

Barrett Estate v. Dexter[95]

In sharp contrast to the holding in *Banton*, the Alberta Court of Queen's Bench declared on this case that the marriage performed between Arlene Dexter-Barrett and Dwight Wesley Barrett was a nullity based upon a finding that Mr. Barrett lacked the legal capacity to enter into any form of marriage contract.

Dwight Barrett was a 93 year old widower who made the acquaintance of a woman almost 40 years his junior, Arlene Dexter. They met in a seniors club where Mr. Barrett was a regular attendee. In less than a year or so, Ms. Dexter began renting a room in Mr. Barrett's house. As part of the rental agreement entered into, Ms. Dexter was to pay $100.00/month and do some cooking and cleaning of the common areas of the home.
Not long after she moved in, however, Mr. Barett's three sons became suspicious of the increasing influence that Ms. Dexter was exerting over their father and, in September of

[93] *Ibid*. at ¶ 136.
[94] *Ibid.* at ¶ 142.
[95] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII).

that year, only months after she had moved in, Mr. Barrett apparently signed a hand written memorandum which gave Ms. Dexter a privilege of living in his home while he lived until one year after his death. The one year term was later crossed out and initialled thus giving Ms. Dexter a privilege of living in the home for the duration of her lifetime and at the expense of the Estate.

Mr. Barrett's withdrawals from the bank began to increase in both frequency and amount. Ms. Dexter then made an appointment with the marriage commissioner, and her daughter and son-in-law were to attend as witnesses. The marriage was not performed as apparently the son-in-law had a change of heart about acting as a witness. Ms. Dexter then made another appointment with a different marriage commissioner. On this occasion, the limousine driver and additional taxi cab driver acted as witnesses. Mr. Barrett advised his grand-daughter of the marriage when she came to visit him on the day after the wedding. Mr. Barrett proceeded to draft a new Will, appointing his new wife as executor, and gifting to her the house and furniture as well as the residue of his estate. A capacity assessment was conducted shortly thereafter and Mr. Barrett's son brought an application to declare the marriage a nullity on the basis of lack of mental capacity to marry, or alternatively, that Mr. Barrett was unduly influenced by Ms. Dexter such that he was not acting of his own will and accord.

In reviewing the evidence, the Court noted that at the time of the marriage, Mr. Barrett told the marriage commissioner that he believed that the marriage was necessary in order for him to avoid placement in a nursing home. There was evidence of alienation by Ms. Dexter, including removal by her of family pictures from Mr. Barrett's home and interference by her with planned family gatherings. Ms. Dexter was also accused of speaking for Mr. Barrett and advising him against answering his son's questions and that she had written documents on Mr. Barrett's behalf.

Not only were all of the assessing doctors unanimous in their finding that Mr. Barrett lacked the capacity to marry, they also found that Mr. Barrett had significant deficiencies which prevented him from effectively considering the consequences of his marriage on

his family and estate. On the issue of capacity to marry, one of the doctors, Dr. Malloy, significantly opined that a person must understand the nature of the marriage contract, the state of previous marriages, one's children, and how they may be affected. Dr. Malloy testified that it is possible for an assessor or the court to set a high or low threshold for this measurement, but that in his opinion, "no matter where you set the threshold, Dwight [Mr. Barrett] failed."[96]

In conclusion, the Court held that the plaintiff had proven, on a balance of probabilities, that Mr. Baxter lacked the requisite capacity to marry. Consequently, the marriage was declared null and void and the court found it unnecessary to decide the issue of undue influence.

Feng v. Sung Estate[97]

Mr. Sung, recently widowed, was depressed and lonely and had been diagnosed with cancer. Less than two months after the death of his first wife, Mr. Sung and Ms. Feng were married without the knowledge of their children or friends. Ms. Feng had been Mr. Sung's caregiver and housekeeper when Mr. Sung was dying of lung cancer. Mr. Sung died approximately six weeks after the marriage. Ms. Feng brought an application for support from Mr. Sung's estate and for a preferential share. Mr. Sung's children sought a declaration that the marriage was void *ab initio,* on the ground that Mr. Sung lacked the capacity to appreciate and understand the consequences of marriage; or, in the alternative, on the basis of duress, coercion and undue influence of a degree sufficient to negative any consent that there may have been.

Justice Greer found that there was no question that the formalities of the marriage accorded with the provisions of Ontario's *Marriage Act*. In addition, the Court found that the marriage was not voidable, as neither party prior to Mr. Sung's death took steps to

[96] *Ibid*. at pp.71-2.
[97] *Feng v. Sung Estate,* 2003 CanLII 2420 (ON SC).

have it declared such.[98] That said, Justice Greer was satisfied on the evidence in this case that the marriage of Mr. Sung and Ms. Feng was void *ab initio*.

In the Court's view, the evidence showed that Ms. Feng used both duress and undue influence to force Mr. Sung, who was in a vulnerable position, to marry her. Justice Greer also states that had she not found that Mr. Sung was unduly influenced and coerced into his marriage, she would have been satisfied on the evidence that Mr. Sung lacked the mental capacity to enter into the marriage. In reaching this conclusion, Justice Greer referred to *Banton* and the fact that Justice Cullity had referred to the principle set out in *Spier v. Bengen* where "the court noted that the person must also have the capacity to take care of his or her own person and property." Applying those principles, Greer J. found that the evidence is clear that, at the time of the marriage, Mr. Sung really could not take care of his person. Although Mr. Sung was capable of writing cheques, he was forced to rely on a respirator and Ms. Feng's operation of it. As well, Ms. Feng was, around the time of the marriage, or shortly thereafter, changing Mr. Sung's diapers.

Accordingly, the marriage certificate was ordered set aside and a declaration was to issue that the marriage was not valid and that Ms. Feng was not Mr. Sung's legal wife on the date of his death. In the result, the Will that Mr. Sung made in 1999 remained valid and was ordered probated.

The decision of Justice Greer was appealed to the Court of Appeal primarily on the issue of whether the trial judge erred in holding that the deceased did not have the capacity to enter into the marriage with Ms. Feng.[99] The Court of Appeal endorsed Justice Greer's decision, although it remarked that the case was a close one.

[98] *Ibid*. at ¶ 51.
[99] *Feng v. Sung Estate* [2004] O.J. No. 4496 (Ont. C.A.).

Juzumas v. Baron[100]

The decision of *Juzumas v. Baron* involves elder financial abuse through civil marriage, but it has a relatively happy ending for Mr. Juzumas, who was capable and himself able to seek civil remedy against his unscrupulous wife with the help of a concerned neighbour.

The case involves a common scenario; an older adult who comes into contact with an individual who, under the guise of "*caretaking*", moves to fulfill more of the latter part of that verb. Mr. Juzumas, the plaintiff, was 89 years old at the time the reported events took place, and of Lithuanian descent, with limited English skills. His neighbour described him as having been a mostly independent widow prior to meeting the defendant, a woman of 65 years.[101] Once a "*lovely and cheerful*" gentleman, the plaintiff was later described as being downcast and "downtrodden".[102]

The defendant's infiltration in the plaintiff's life was credited for bringing about this transformation. The financial exploitation, breach of trust, precipitation of fear, are all hallmarks of a predator. The defendant "*befriended*" Mr. Juzumas in 2006. She visited him at his home, suggested that she provide assistance with housekeeping, and eventually increased her visits to 2-3 times a week. She did so despite the Mr. Juzumas's initial reluctance. The defendant was aware that he lived in fear of being forced to move away from his home into a facility. She offered to provide him with services to ensure that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.

The defendant ultimately convinced the plaintiff to marry her under the misrepresentation that she only wanted to be eligible for a widow's pension following his death, and for no other reason related to his money or property. She promised to live in the home after they were married and to take better care of him. Most importantly, she

[100] *Juzumas v. Baron*, 2012 ONSC 7220 ["*Juzumas*"].
[101] *Ibid.* at ¶ 1.
[102] *Ibid.* at ¶ 39 and 56.

undertook not to send him to a nursing home as he so feared.[103] Ms. Baron testified that Mr. Juzumas had suggested that they marry on the basis of their mutual feelings of affection, romance, and sexual interest, but Justice Lang found otherwise. Ms. Baron, who had been married approximately 6-8 times (she could not remember the exact number), had previous *"caretaking"* experience: prior and concurrent to meeting Mr. Juzumas, she had been caring for an older man who lived in her building. She had expected to inherit something from that man in addition to the pay she received for her services and was left feeling sour as she had not. Justice Lang considered this evidence as an indicator that Ms. Baron was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone's Will on the basis that she provided that person with care is unenforceable**.**

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. A Will executed in contemplation of marriage is not subject to the provision in the SLRA that revokes a Will upon marriage. In spite of the obvious age gap and impending marriage, the lawyer did not discuss the value of the Mr. Juzumas's house ($600,000) or the possibility of a marriage contract.

Interestingly, the lawyer did not meet Mr. Juzumas without Ms. Baron being present.

After the wedding ceremony, which took place at the defendant's apartment, Ms. Baron dropped Mr. Juzumas off at a subway stop so that he could take public transit home.

Despite the Ms. Baron's promise that she would provide better care if they married, testimonies from Mr. Juzumas's tenant and neighbour, which were both found to be credible, attested that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff's niece, as "*'abusive', 'controlling' and 'domineering'*".[104]

[103] *Ibid.* at ¶ 28.
[104] *Ibid.* at ¶ 54.

After the wedding, Ms. Baron and her son devised a plan, in consultation with the same lawyer who drafted the Will, to transfer Mr. Juzumas's house into Ms. Baron's son's name. They drafted an "agreement" that acknowledged that Mr. Juzumas did not want to be admitted to a nursing home. Justice Lang found that even if the "agreement" had been shown to Mr. Juzumas, his English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of real estate.[105] The lawyer's notes indicated that Mr. Juzumas was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that Mr. Juzumas was "acceding to someone else's direction," and not a wilful and active participant to the transaction.[106] In addition, Justice Lang found that Mr. Juzumas had been under the influence of emotional exhaustion or over-medication at the time the meeting took place. The court found that this over-medication may have been the result of Ms. Baron drugging Mr. Juzumas's food.[107]

Sometime after the meeting, Mr. Juzumas's neighbour explained the lawyer's reporting letter to him, and its effect in respect of his property. With his neighbour's assistance, Mr. Juzumas attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his arrival, his "*wife"* would appear. The lawyer explained that the transfer could not be reversed because it was "*in the computer*."[108]

Notably, although Mr. Juzumas initially sought a declaration that his marriage was a nullity and void *ab initio*, he did not pursue this claim. Instead he sought a divorce/dissolution of the marriage, which was granted.

In considering the transfer of property, Justice Lang considered a "cluster of remedies" that may be used "where a stronger party takes advantage of a weaker party in the

[105] *Ibid.* at ¶ 68-69.
[106] *Ibid.* at ¶ 91.
[107] *Ibid.* at ¶ 63 and 92.
[108] *Ibid* at ¶ 97.

course of inducing the weaker party's consent to an agreement."[109] Justice Lang outlined the applicable legal doctrines of undue influence and unconscionability, stating: *"if any of these doctrines applies, the weaker party has the option of rescinding the agreement*."[110]

Lang J. found that a presumption of undue influence existed between the parties in this case as the relationship in question involved an older person and his caretaker. The relationship was clearly not one of equals. In such a case, the court noted that the defendant must rebut such evidence by showing that the transaction in question was an exercise of independent free-will, which can be demonstrated by evidence of independent legal advice or some other opportunity given to the vulnerable party which allows him or her to provide "*a fully-informed and considered consent to the proposed transaction.*"

As for the doctrine of unconscionability, Lang J. stated that the doctrine *"gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power.*" The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case.

Substantial costs were awarded in favour of Mr. Juzumas.

This case provides insightful guidance in the area of elder financial abuse, as it demonstrates the tools of contract law and equity afforded to the court, in order to remedy a wrong incurred in the context of financial abuse. This case provides what is, in cases of financial abuse, a rarity: somewhat of an uplifting ending. In this case, it is not a family member or acquaintance that brought the case before a court after the vulnerable adult's assets had already been depleted, but rather, the older adult himself, who, with the help of his neighbour, was able to seek justice and reverse some of the defendant's wrongdoing.

[109] *Ibid.* at ¶ 8 citing John McCamus, *The Law of Contracts* (2d) (Toronto: Irwin Law, 2012) at 378.
[110] *Juzumas*, *supra* note 101, at ¶ 8.

COMMENTARY ON CASE STUDIES

It would be inaccurate to suggest that either the SLRA or the FLA fails to protect older adults from financial abuse and exploitation, as neither statute was drafted for that purpose. Instead, it is more accurate to conclude that as a result of the common law definition of marriage and the *Marriage Act*, the SLRA and the FLA have unintended consequences that negatively impact older adults with diminished capacity.

Recall that section 15 of the *Charter* provides that all people are entitled to equal protection and benefit of the law regardless of age or mental disability, and that recent appellate case law applied section 15 of the *Charter's* to ensure that the definition of marriage did not present a discriminatory bar to some Canadian adults.[111] Narrowing the definition of capacity to marry could serve as a discriminatory bar to marriage for people with diminished capacity. It may therefore be necessary to approach this issue from another angle, perhaps by amending the SLRA so that marriage no longer has the effect of revoking a will. It may also be helpful to consider whether the death of a spouse should always necessarily trigger the availability of an equalization payment to the surviving spouse, as is currently the case under the SLRA and the FLA. In the meantime, instances of financial abuse and exploitation through civil marriage will continue.

Concluding Remarks

We have reviewed select federal and provincial statutes that affect older adults in Canada with a view to considering whether and to what extent they prevent the financial abuse and exploitation of older adults.

[111] *Halpern*, *supra* note 83, at ¶ 155.

In some instances, as with the *Marriage Act*, the SLRA and the FLA, it appears as though the statutes may have unintended negative consequences that can be exploited by unscrupulous individuals for financial gain. In other cases, as with the SDA and the Criminal Code, the protective provisions of the statutes may be diminished by social factors. For example, older adults often rely on their abusers for their care and support, which may prevent many victims from reporting their abusers to the police. The SDA and the Criminal Code may also present barriers to older adults with literacy and education gaps such that their ability to understand and exercise their statutory rights under the SDA and the Criminal Code is limited.

There appears to be some tension between our theoretical notions of family, and the practical reality reflected in cases discussed above. On the one hand, the government relies heavily on family members to exercise their authority as attorneys for property in accordance with the governing provisions of the SDA, without any mandatory financial reporting. On the other hand, our Courts do not grant family members comparable immunity from reporting in court-ordered guardianship appointments. The case law discussed herein suggests that it may be the time to revisit the Attorney for Property mechanisms and substitute decision making in general, to ensure that it is more effective in preventing the financial abuse and exploitation of older adults. To that end, it may be also be instrumental to reconsider the reporting requirements presented by the Advisory Committee which were later abandoned as the SDA came into effect.

There are changes underway in federal and provincial statutes that may curb the incidence of financial abuse and exploitation discussed in the above case studies. In the criminal law realm, the Canadian *Criminal Code* has been amended to permit judges to consider the victim's age and vulnerability as aggravating factors in determining appropriate sentences. In addition, many police forces are increasingly recognizing that the misuse of the Power of Attorney for Property is not just a civil matter, and that effective policing is enhanced by specialized elder abuse units.[112] Police forces are

[112] LCO Report, *supra* note 3 at pp. 173 – 176. For a summary of cross-Canada policing initiatives that target elder abuse, as presented by Toronto Police Service's Police Constable Patricia Fleischmann during the April 2013

effecting this change through increased and focused training in matters of elder law and substitute decision making.[113] Some forces are also exploring innovative projects that bring together specially trained constables with social service agencies and social workers to assist vulnerable older adults in reporting these crimes.[114] Other institutions including banking and financial organizations are also working towards developing protocols and legislation to curtail the misuse and abuse of SDM's powers.

Provincial laws are also changing. For example, with respect to substitute decision making regimes, a recent report focused on the needs of older adults presented a framework for identifying ways in which existing laws can be improved insofar as they impact, for better or worse, the lives of older adults.[115] This framework may serve as an impetus for the re-evaluation of the SDA. Indeed, the SDA was referenced in the report as an example of a statute that may have unintended negative consequences in the lives of older adults.[116]

In addition to changes in statutory substitute decision making regimes, some provinces have recently amended their statutes pertaining to estate succession and property equalization. For example, currently in Alberta and in British Columbia as of as of March 2014, marriage no longer revokes a Will.[117] This may reduce the financial incentive to those unscrupulous individuals who seek to use civil marriage as a windfall.

Canadian Bar Association's Elder Law Conference, see: "National Elder Law Conference: Legal, Societal and Policy Issues Affecting the Older Adult – A National Policing Perspective" available online at <http://whaleyestatelitigation.com/resources/WEL_ELD13_slides_fleischmann.pdf> [Fleischmann].

[113] *Ibid*, Fleischmann.

[114] *Ibid*. See also, for example, Calgary Police Service's Elder Abuse Response Team, as presented by Acting Sergeant Graeme Smiley during the April 2013 Canadian Bar Association's Elder Law Conference, available online: <http://whaleyestatelitigation.com/resources/WEL_EART_Presentation_NVCW_April_25_2013.pdf>

[115] LCO Report, *supra* note 3.

[116] *Ibid*, pp. 135 to 137.

[117] *Wills and Succession Act,* SA, 2010 c. W-12.2, s. 23(2); *Wills, Estates and Succession Act*, SBC 2009, c 13 (not yet in force).

Canada has a robust statutory framework that is, generally speaking, useful in the prevention of abuse and exploitation of older adults. It will be interesting to see if the considered and ongoing changes to these statutes will reduce incidences of abuse perpetrated through the misuse of substitute decision making authority and civil marriage.

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