**EMPOWERMENT & EDUCATION DAY Presentation 15th June 2015**

**King’s University College, London, Ontario**

**ABREVIATED NOTES FOR PARTICIPANTS**

We all know that the “**baby boomer bubble**” as it is called is putting increasing strains on our health care systems and in financial circles it is has long been known that the biggest transfer of wealth from parents to children will be taking place over the next few years when the baby boomers finally leave us for greener pastures in the hereafter.

Statistics Canada reports that by 2031 – just 16 years from now – 25 percent of the Canadian population will be over the age of 65 years.

A U.S. report I reviewed referred to the prevalence of Elder Abuse as now being of “epidemic” proportions!

in terms of the FORM of abuse we know it can appear in many ways and there are lots of online and library resources to give us lists. However, the same Statistics Canada report I referred to just now spells out the basics for us:

* **Neglect**: Signs include unkempt appearance, broken glasses, lack of appropriate clothing as well as malnutrition, dehydration and poor personal hygiene.
* **Physical Abuse**: Signs include untreated or unexplainable injuries in various stages of healing, limb and skull fractures, bruises, black eyes and welts.
* **Psychological/emotional abuse**: Watch for changes in behaviour (emotional upset/agitation resulting in sucking, biting, rocking), withdrawal or non-responsiveness.
* **Economic/financial abuse**: Watch for sudden changes in bank accounts or banking activity, and major changes to legal documents such as powers of attorney and wills.

From a lawyer’s perspective we tend to focus on the economic or financial abuse situations

***The Little Black Book of Scams***

You will find this one at the Government of Canada, Competition Bureau website and it lists a dozen different forms of financial abuse or “scams” as they are sometimes called

The website also generously allows reproduction of any of the material

***Seniors Guidebook to Safety and Security***

You can find this material on the RCMP website and is fairly extensive in providing details of various forms of financial abuse.

Tucked away in the list of potential abuse situations is

**“Institutional Abuse (overcrowded, substandard and/or unsanitary living environments)”**

**“MAGIC TRICKS”**

**Enter each item - Bank Inspector NEVER contact that way**

I have to say it isn’t always a fake bank inspector – sometimes it **IS** a bank employee who steals the money.

I was reading about a recent court proceeding in California where a J.P. Morgan Chase bank employee decided to steal more than $100,000.00 from an elderly client suffering from dementia. When a GIC type of investment matured the employee issued two bank drafts and put them into his own mother’s account. When the elderly client finally died at 91 the family questioned where the funds were and the theft discovered. The bank employee is waiting a sentencing hearing as we speak.

**Home renovations 3 quotes & in writing – BBB check**

This one strikes home with me because friends had a driveway paving company come by a few years ago told them they would get a great resurfacing job done took their money and of course the work turned out to be substandard but these characters had disappeared and didn’t even have a legitimate office or base

**Door to door sales – NEVER !**

Anyone can stand at a doorway and represent themselves as representing any company – the more well know the better At the LEAST they should be asked for identification and even that could be fraudulent. The best approach is to simply not do business at the door – tell them to leave a card or brochure and you will contact the company at your convenience – then check them out

**Utility inspection – never done**

This is a classic case of distraction – while one man supposedly checks the meters and equipment another runs around looking for money or easy pickings to steal

**Charity donations**

These days it is rare for charities to canvass door to door for donations and even if they did you usually hear about it on the news. Charities knocking your door unexpectedly is likely a good indication that you are looking at a fraudster. Just tell the you will send in a donation by cheque or online.

**Lottery – not if you didn’t enter!**

This one is obvious – if you didn’t enter a contest you cannot possibly be a winner.

I recall a client coming in clutching a document and telling me quite seriously that she suspects her bank of stealing a million dollars of her money. Well of course given my comment about the bank employee just now it IS possible. So, I asked her what evidence she had to support her suspicion. She showed me a document which said she had WON a million dollars and it would be transferred to her bank – of course when she went to the bank there was no million – 2 and 2 said the bank must have stolen it – not completely illogical EXCEPT the letter said **IF** your numberis the winning number and **IF** you send us $29.99 you will get the million dollars - I know the client was not convinced and didn’t want me to shred the letter – she decided to take it home and it wouldn’t surprise me if she went ahead and sent in the $29.99

**Free vacation – nothing is free!**

As with the lotteries you don’t get anything for free – it is often substandard accommodation and you do have to a few hundred dollars “processing fee” to get the trip

**Prize ! for what – how did you get entered!**

Prized for nothing should be an obvious red flag for anyone but the “something for nothing” mentality takes over for a lot of people and they don’t see the catch which is usally to pay for postage, shipping or a processing fee

**Medical cures – ointments/treatments – check with pharmacy**

This one of course is particularly nasty – preying on the chronic conditions that some people suffer from – any such offers should be checked with a pharmacy not only for its legitimacy but its value and cost.

**We also see a lot of magic tricks on the internet:**

**Fake websites – leave site and search – NEVER give personal info**

**Phishing emails**

**Online auctions – item not as represented - $ lost**

**Malicious software – don’t download**

**Major concern – bad guys prey on loneliness**

Dating sites, emails can try and win sympathy and romance through lies, fake photos and attempts to gain the trust of the senior – then comes the stories of how the person would love to travel to meet you but does not have the money. Or a family member is sick and they know you will help financially

These types of abuse are sometimes referred to as **“predatory” relationships** – someone is looking for an individual with money or at least someone who has the ability to give them a roof over their heads and provide their meals. They will say whatever is needed in order to achieve that goal. Targeting a needy senior is an easy way to **get what they want.** This is certainly something I watch for in my practice – individuals who suddenly want to transfer assets or include someone as a beneficiary of a Will.

If you look at the publications I referred to before you can see there are many more tricks out there that you need to watch out for but perhaps the biggest threat is

**IDENTITY THEFT**

This isn’t just useful when considering elder abuse but also on a personal level – we are **all** susceptible to this !

And the bad guys can just as easily be male or female.

They just need to put together enough information and they can steal someone’s identity

That means they can use a credit card, access a bank account and all kinds of things. Essentially, the thief becomes you.

There are some things that can be done to reduce the risk of this happening:

Sign credit cards when they are received

Don’t lend a card to anyone

Report lost cards

Keep all receipts from bank machines, stores etc

Don’t write down P.I.N.s

Don’t give personal information over the phone or by email.

Don’t give information at the door

A major concern from a legal perspective is what I am going to call **“estate manipulation”**

**JOINT OWNERSHIP**

I often hear of people putting bank accounts, savings and even their home in joint ownership because they think it will save “death taxes” or “probate fees

When it is a spouse who is the joint owner there is usually no problem. However, if a client is going to add a son, daughter or someone else to an asset the risk of problems arise

1. One way street – can’t take them off without their consent
2. Creditors
3. Taxes – capital gains on real estate
4. Spousal claims
5. Uneven division of assets on death – asset liquidated etc

And it is often a spouse, partner, child or other individual who promotes the “joint asset” approach as being for the senior’s benefit but in reality is designed to line his or her own pocket.

**POWERS OF ATTORNEY**

As I am sure most of you know, a Power of Attorney document provides for someone to

manage your financial affairs on your behalf. It does **not** require you to be incompetent before

it is used so I always tell clients not to provide a copy to the bank or other financial

institution until it is necessary. I tell clients to leave the signed originals with me and not

to let a copy out of my office unless there is a good reason. Clients don’t need to find

out that their assets are being managed before it is appropriate.

Unfortunately, many seniors happily give out the original signed document or a certified

copy and find control of finances has been taken away or even financial abuse

bordering on theft or fraud has taken place. .Clients are often convinced that the person

appointed can be trusted and don’t want to consider that it may be used for their

personal benefit.. “ It is my daughter and I can trust her!”

Theft by the use of a Power of Attorney is so prevalent that that we have a specific

section of the ***Criminal Code of Canada*** to deal with it

THEFT BY PERSON HOLDING POWER OF ATTORNEY - SECTION 331 CC

**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.**

The police are of course usually involved in investigating this type of crime and charges can be laid and the matter ends up in front of a Court. So, to bring this to life for you let me tell you about a decision that I read and was handed down by the Ontario Court of Justice a couple of years ago called ***Her Majesty the Queen v. Kaziuk*** which was a particularly bad case of financial abuse.

One of the charges faced by this accused was that he had told a friend that he needed $20,000.00 to bury his deceased mother when in fact mother was still alive. Unfortunately, she was not “alive and well” as the expression goes –“just alive”.

The facts before the Court showed that Mrs. Kaziuk was an 88 year old woman whose husband had passed away some 9 years earlier. The accused was her only son who was 57 years old. It seems that before all these problems started Mrs. Kaziuk owned two condos in Oakville which were mortgage free, a mortgage free property in Miami and a approximately $1 million dollars in the bank. Over the years the son was able to put mortgages on the condos which, once in default, resulted in the banks selling them, Mrs. Kaziak’s money also disappeared and her son even took her car and credit cards. She ended up living in a shelter for homeless people run by the Salvation Army.

When the Court looked at this man’s criminal record it showed he had 69 convictions for various offences such as fraud, forgery and outright theft. The prosecutors asked the Court to put this man away for 4 to 6 years so as to take into account the possibility for rehabilitation but the Court said this man cannot be rehabilitated – jail terms before had done nothing for him – The Court sentenced him to 10 years – the maximum available and more than double the sentence suggested !

In unusual colourful language the Court said:

***This man would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could***

Unfortunately, as the Court noted, this man will be kept warm and fed in jail which would probably be more comfortable than the circumstances in which he left his mother.

While we often focus on physical abuse because of the dramatic evidence it produces clearly financial abuse can have an equal if not devastating effect In this case the Court noted that this man’s mother did suffer physically and emotionally as a result of the financial abuse.

**The key to identifying financial abuse is to question whether the financial transaction appears normal. For example in the Kaziuk situation I would have questioned why a woman with so much money would want to mortgage all her properties. A banker could perhaps wonder why an 88 year old woman is suddenly spending such large amounts of money.**

Another avenue which can be pursued from a legal point of view when faced with financial abuse is

Section 42 of the ***Substitute Decisions Act*** allows a Court to Order what is called “A Passing of Accounts” which essentially requires a person handling someone’s financial affairs to file accounts with the Court to justify what has been done with someone’s assets and income.

That section provides who can apply to the Court for that purpose but also adds that the Court can authorize “***any other person***” to make that application. So, I could do so on behalf of a client if I thought his or her finances were being managed improperly. Any one of you could do so even if you are completely unrelated to the abused person. You would of course have to establish for the Court why you should be allowed to make the application. Perhaps as a close confidant in a nursing home the financial abuse is made know to you.

Apart from dramatic problems such as fraud and theft involving Powers of Attorney there are some every day obligations which I would dare say most people, including many professionals, are unaware of.

We can start with Section 32 of the ***Substitute Decisions Act provides:***

[***(3)***](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_92s30_f.htm#s32s3)***A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian’s decisions about the property. 1992, c. 30, s. 32 (3).***

***Family and friends***

[***(4)***](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_92s30_f.htm#s32s4)***The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person. 1992, c. 30, s. 32 (4).***

***Consultation***

[***(5)***](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_92s30_f.htm#s32s5)***The guardian shall consult from time to time with,***

***(a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and***

***(b) the persons from whom the incapable person receives personal care. 1992, c. 30, s. 32 (5).***

And we can also turn to Section 62 which deals with the duties of someone holding a Power of Attorney for Personal Care

**Best interests**

[(4)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_92s30_f.htm#s66s4)  In deciding what the person’s best interests are for the purpose of subsection (3), the guardian shall take into consideration,

(a) the values and beliefs that the guardian knows the person held when capable and believes the person would still act on if capable;

(b) the person’s current wishes, if they can be ascertained; and

(c) the following factors:

1. Whether the guardian’s decision is likely to,

i. improve the quality of the person’s life,

ii. prevent the quality of the person’s life from deteriorating, or

iii. reduce the extent to which, or the rate at which, the quality of the person’s life is likely to deteriorate.

2. Whether the benefit the person is expected to obtain from the decision outweighs the risk of harm to the person from an alternative decision. 1996, c. 2, s. 43 (3).

**Records of decisions**

[(4.1)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_92s30_f.htm#s66s4p1)  The guardian shall, in accordance with the regulations, keep records of decisions made by the guardian on the incapable person’s behalf. 1996, c. 2, s. 43 (3).

**Participation**

[(5)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_92s30_f.htm#s66s5)  The guardian shall encourage the person to participate, to the best of his or her abilities, in the guardian’s decisions on his or her behalf. 1992, c. 30, s. 66 (5).

So, these provisions bring home the fact that individuals are capable of making some decisions but perhaps not others. When they can make rational decisions we are obliged to acknowledge them and act accordingly.

**LOANS**

The other manipulation I see sometimes is where a child or grandchild asks for a “loan”

perhaps a down payment on a home. That loan is usually not in writing and if the

recipient family member goes bankrupt the money is gone. Sometimes the “loan” is

really a disguised request for an advance against an inheritance. My advice to clients is

to tell the person that a loan is a great idea, you are happy to help and you will ask your

lawyer to draw up a loan agreement so they can see what their payments would be and

how soon the loan should be repaid. Perhaps the loan should be secured by a

mortgage on the home. Most often there is a sudden change of plans and the loan is

not needed after all !

The **key** to how some of this abuse is easily perpetrated and why it seems to particularly affect older clients is the degree of competence which each person displays. Deficiency in the ability to understand complex financial transactions creates vulnerability and so people in this situation can easily be the subject of manipulation or undue influence especially by individuals who they feel they can trust.

Even in the ***Kaziuk*** case I talked about the Judge noted that Mrs. Kaziuk seemed fixated on the idea that everyone in the world was out to get her money but not her son!

From a lawyer’s point of view this inability to appreciate the complexity of what is being done is troublesome – whether it is a trust fund being create in a Will, transferring interests in real estate or perhaps placing a mortgage on a property needs a certain comprehension of what is being done and the reasons for it.

In April I was attending a conference for lawyers in Toronto which dealt with real estate law and one of the speakers was Dr.Kenneth Shuman who helped us understand that while “competency’ is a black and white legal concept the reality is very different. And, while I am obviously not qualified to talk about the psychiatric or medical research in this area I can “parrot fashion” a couple of things which he shared with the audience.

**COMPLEXITY AND AGE**

It seems that the degree of complexity which individuals can competently deal with decreased with age.

So, all things being equal I should expect that, unless there are signs or red flags as to the lack of competency, a 65 year old client coming into my office will be able to appreciate the complexity of the issues we will discuss. But as the client’s age progresses it is likely that ability decreases until at a certain point the expectation is not there and I have to exercise much more due diligence to ascertain competency.

Of course age is not the only factor – we need to look at general health, any obvious red flags such as a diagnosis of dementia or is the client on medications which may or may not affect reasoning. Even hearing or vision problems can make an assessment of competency difficult because clients may not hear well or be able to review documents.

Something else which Dr. Shulman talked about

The “clock”

Used as a tool to assess competency. He shared “clocks” at my conference to demonstrate different levels of competence in patients with dementia or suffering from the effects of a stroke.

On one slide he showed a series of clocks which unlike my example had no numbers or hands – just a circle. The clocks had been drawn by a female patient over a period of some years and each was was progressively worse. At first the patient could draw the numbers on the dial in the appropriate spots and hands showed the time requested by the medical staff. As the clocks progressed numbers were missing, hands were in the wrong place and eventually as the dementia set in the clock was almost unrecognizable as a clock. Clearly, these clocks were providing a good picture of the mental decline of the patient.

The other slide showed a clock drawn by a male patient who had suffered a stroke. The numbers on the clock were all grouped on the right hand side of the clock into a small space which barely dealt with a quarter of the circumference. The hands of course didn’t point at anything! As time went by the patient was able to draw progressively better and more accurate clocks and to point the hands at the precise time requested. The clock showed this man was gradually returning to a normal state of mental ability. At least in terms of drawing clocks.

But nevertheless Dr. Shulman said that these clock drawing are a good window into the mental capacity of patients. And of course the capacity to do so can fluctuate which is a lesson for us.

I did think it could be something useful nursing homes and retirement homes could use as a “game’ for residents to play. I don’t know if the medical professionals would frown on such an idea but I throw it out there.

AND, this is because while it may be a legal exercise for lawyers individuals will have different degrees of competency and that will also vary day to day. It also follows that individuals living in retirement homes or nursing homes are entitled to have their wishes respected and cannot be ignored. And that takes me to additional legal frameworks which apply when retired individuals do move to retirement homes or nursing homes

Before moving on to my next topic I thought I would share a recent Court decision with you. In a case called The Crown v Davy, 2015 CanLII 10885 (ON SC) which was tried in Barrie earlier this year a couple were found responsible for failing to provide the necessities life , which is a *Criminal Code* offence ( Section 215) to an elderly woman. The woman was found by paramedics in such a poor physical state that they characterized her appearance as a “concentration camp survivor from the second world war”. She was lying naked on a mattress in a dark room and once examined at a hospital was found to be dehydrated, malnourished and much more. The Court found both the defendants guilty of the charges and sentenced each to 12 months in prison along with a period of 2 years probation. As is usual the Court looked at earlier sentencing decisions and cited one Court which said:

***“elder abuse is a growing problem in society and it has to be addressed by a sentence that meets the principle of general deterrence.  This could only be accomplished by incarceration***.

So while I have focused on financial abuse it is also clear that the Courts will not tolerate physical abuse either.

**RETIREMENT LANE**

If an individual finds himself or herself in a Long Term Care home there are legal considerations which we find in the ***Long Term Care Homes Act***

It possibly comes as a surprise to some professionals who work in this area that this statute contains a number of legal obligations which must be complied with. The Act has 193 sections so I am only going to highlight a couple:

A Long term care facility must have a Resident’s Bill of Rights which essentially acknowledges that residents are entitled to freedom from abuse or neglect and that everyone who works in the facility is aware of those rights. (Section 3)

It has to create a resident’s council and work with that council to address any concerns. It has to survey the residents **and their families** each year to measure the level of satisfaction of care and services provided. (Section 85)

The legislation also requires that complaints are to be reported to the “Director” but that does not mean the Director of the facility it means to the Director of the Performance and compliance branch of the Ministry of Health. The Act requires facilities to have a written procedure as to how complaints are to be dealt with.

Not only do licensees of long term care homes have a duty to report neglect or abuse or financial abuse but so do physicians and social workers irrespective of issues of confidentiality. Section 24

And the Act goes on to say that “whistle blowers” cannot be subjected to any form of retaliation or even dissuaded from reporting abuse or neglect

Certainly any provision in an employment contract which prohibit employees from reporting alleged abuse or neglect would be void. The Act even provides that the “whistle blower” cannot be used unless acting in bad faith.

I would anticipate that any long term care home which has not reviewed the requirements of this statute had better do so quickly given what I will tell you in a moment.

**RETIREMENT HOMES ACT 2010**

Retirement homes are regulated under the umbrella of the Retirement Homes Regulatory Authority which has its own website at [**www.rhra.ca**](http://www.rhra.ca)

Again, this is an extensive statute with many sections and many mirror those in the Long Term Care Homes Act in terms of requirements to report abuse, protection of whistle blowers against retaliation and so on

**Privacy**

First, you can obtain **written consent** from someone to disclose information.

It is also the case that **contracts** can contain obligations to report neglect, abuse and so forth.

I have already mentioned **Statutory** requirements to report

**Lawyers**: are only allowed to breach solicitor/client confidentiality only where crime likely to be committed

Finally, of course **Crimestoppers** ! Avoids most privacy concerns

**THE FUTURE**

When I was at the GTA Elder Abuse conference last Fall I was excited to hear a speaker from the Law Reform Commission of Ontario which has been conducting research into elder abuse and offering suggestions to the Ontario government about strategies to address various issues:

**Reforming The Law of Legal Capacity and Decision- Making**

Law Commission of Ontario Project. 2014. Issues:

1. **Assessing Legal Capacity** - confusing processes, not fully understood by individuals and service providers. Insufficient training and oversight leads to failures to protect.

Streamlining, training and advocacy supports needed

1. **Better Protection for Autonomy**

Inflexibility in appointment process, assessments and use of decision making powers. Lack of flexibility in approach to legal capacity.

Temporary or limited forms of substitute decisions making. Stronger procedural protections and again, education and training

1. **Who can Provide Assistance for Decision Making**

Demographic changes increases individuals with no substitute decision maker.PGT may not be best option.

Regulated Professional guardians option, volunteer guardian program and community organizations to have role.

1. **Monitoring and Accountability of SDMs**

Vulnerability to abuse. SDM may not understand responsibilities

Training, education. Reformed appointment process. Monitoring or reporting requirements. New or expanded investigation of complaints process.

1. **Resolving Disputes & Protecting Rights**

Accessibility especially to Courts, power imbalances, family conflicts

Alternative dispute resolution, advocacy assistance, simply process, tribunals.

1. **Pervasive Misapplication of the Law**

Misunderstanding of law pervasive among individuals service providers and professionals ! Difficulty in identifying resources. Lack of systemic education

Stronger oversight and remedies, education at all levels, central clearing house for resources. Clear statutory responsibilities for education and training.

As is typical for a lawyer I often bring bad news but today we are here to talk about protecting our seniors and I hope I have shared to some degree how we might do that by being aware of the forms of abuse and what the law can do about it.

As a society we have recognized the serious and significant problems which are faced by the senior members of our community and as a group we can all play our various

roles but I have to say that I think it is exciting that the Law Reform Commission has brought some fresh ideas to the table which may enable us to deal with the issues in a much more productive manner.

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