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- Tribunal Provides Guidance On Financial Abuse Of Elderly

By Jordan Glick and John Risk

Overview

Canada has an aging population, with more Canadians over the age of 65 than under the age of 15.¹ As the population of older Canadians grows, so does the concerns for elder mistreatment, most commonly financial abuse.² Despite this issue being a serious public health concern,³ the topic has rarely crept into the legal lexicon. It is limited to the clearest of cases, typically involving fraud.

Elder financial abuse is more than fraud. It covers a range of issues. Examples are the sale of assets against the wishes of an elderly person, taking advantage of an elder's lack of capacity to understand a contract, and using the personal information of an elder to obtain services.⁴ Lawmakers, regulators, courts and tribunals are turning their minds to these issues.⁵ Paving the way is the decision of Vice Chair Laurie Sanford ("**VC Sanford**") in the recent Licence Appeal Tribunal decision of *2138658 Ontario Ltd. o/a Seeley's Bay Retirement Home v. Registrar, Retirement Homes Regulatory Authority ("**Seeley's Bay**")*. This is the first case to look at financial abuse in the context of the *Retirement Homes Act, 2010* (the "**Act**").

Section 67 of the Act requires a licensee to protect residents of a retirement home from abuse by anyone. This includes financial abuse. Section 1 of Ontario Regulation 166/11 to the Act defines "financial abuse" as "any misappropriation or misuse of a resident's money or property". The Act states that a licensee must set up a trust fund for any money that a resident entrusts to the care of the licensee, but the Act is silent with respect to loans between a resident and the licensee. This raises the question of whether a loan from a resident to a licensee is financial abuse. The issue of loans was central in Seeley's Bay.

Facts and Conclusions

The Retirement Homes Regulatory Authority ("**RHRA**") is the licensing body for retirement homes in Ontario. Seeley's Bay dealt with an appeal of the RHRA Registrar's revocation of a licence. The revocation was in part on the basis of the alleged financial abuse of three residents. The hearing also considered the loan by a former resident to the licensee. The Registrar did not allege financial abuse with respect to the former resident.

The facts surrounding the three residents and the former resident were unique:

(1) The former resident had offered to grant the licensee a second mortgage. The resident had a lawyer and was fully competent. VC Sanford noted that the resident had the protection of independent legal advice and a written mortgage with a rate that was not unduly low. VC Sanford would not have characterized these circumstances as financial abuse.

(2) Residents 1 and 2 were a couple. Over a 25-30 year friendship with the licensee, they had come to regard him as a son. When he came to them in need of money, they offered a loan in the form of prepaid rent. This was their idea. There was nothing in writing with respect to the loan. There was no security. No interest was payable, and the couple would not have accepted it in any case. They did not have a lawyer. The licensee counted the loans toward rent. The licensee had paid off the loan at the time of the hearing.

VC Sanford found that the licensee did not financially abuse these residents. She noted that the benefit of the loan was “a matter of friendship and faith”. Neither resident felt abused. VC Sanford observed that, “these are trade-offs that people who are competent to manage their own affairs ought to be allowed to make, whether they are protected under the Act or not”. Although VC Sanford did not consider the acceptance of the loan abusive, she did find that it showed a lack of integrity that falls below the standards expected of licensees.

(3) Resident 3 lived at the home for six years before passing away prior to the hearing. She was capable and managed her own finances and care decisions until her death. She had no close family. At some point, the licensee began approaching her for money, which he applied to her rent. The licensee continued to borrow money beyond the amount of prepaid rent. There was nothing in writing about the loan and no record of the prepaid rent. There was no interest. Resident 3 did not have a lawyer to advise her about the loans or prepaid rent.

The resident’s health started to deteriorate in 2016. She worried that her care needs would increase and she would not have the money to pay for more care and expenses, because of the money she advanced to the licensee. She was concerned about the lack of paperwork for the loan, and that she had lost track of the money owing to her. She worried about the fact that the licensee took no action when she approached him about repaying the loans. After the resident died, the loans were still outstanding. The amount outstanding was in dispute at the hearing.

VC Sanford found that the licensee subjected Resident 3 to financial abuse. She noted that the loans were interest free, and that the licensee applied them to his use and did not repay them on request. To VC Sanford, this was “misappropriation” of resident money under the Act.

As with Residents 1 and 2, VC Sanford found that the loans raised serious concerns about the licensee’s ability to operate the home with honesty and integrity. In doing so, she noted the resident’s dependency on the home. She also noted that the licensee placed the resident at risk of harm and caused her harm. The risk was not being able to pay for treatment or devices, or long-term care. The harm was the effect on her peace of mind.

Financial Abuse in Congregate Care

VC Sanford’s findings relied in part on expert opinion evidence. The evidence related to the risks that the elderly face with respect to financial abuse, both generally and in the congregate care setting. The normal process of aging affects the ability to make financial decisions and to avoid contexts that may lead to abuse. Even a mild decline in cognitive function links to poor financial decision making. In a retirement home setting, the elderly may face greater risk of abuse as they are dependent on the operator for housing, safety and care. This dependency creates an expectation of trust between the resident and the operator. The risk of financial abuse increases where there are factors that increase this dependency. These factors include lack of mobility, visual impairment, non-use

of social services, and being without a spouse or friend. VC Sanford reviewed these factors and observed that the most prudent practice would be for a retirement home operator to avoid taking loans from residents.

VC Sanford acknowledged the expert's view that aging alone is not necessarily a risk factor for financial abuse. Where a retirement home resident is competent, the question of financial abuse will depend on the circumstances. VC Sanford did not find abuse where a competent resident gave a loan as a matter of friendship and faith. The view that regulation should not unduly constrain the choice of a competent senior is in keeping with the Law Commission of Ontario's 2012 report, "A Framework for the Law as it Affects Older Adults".⁶ The Law Commission warned that the association of older adults with vulnerability may lead to paternalism.⁷ In a similar vein, the Quebec Human Rights Tribunal speaks of "the need to balance the protection of aged persons against exploitation, on the one hand, and the scrupulous need to respect their autonomy in exercising their civil rights, on the other hand".⁸ VC Sanford appeared to be seeking that balance. Although this interpretation only goes so far, given that she concluded that the loan arrangements showed a lack of integrity which alone would form a basis for revoking the retirement home licence.

Conclusion

VC Sanford is among the first adjudicators to tackle the issue of financial abuse of older adults in congregate care. Here are four key lessons to take from Seeley's Bay:

1. Seniors in congregate care face a higher risk of financial abuse because of their dependency and factors that increase it. For this reason, it is prudent practice for operators to avoid taking loans.
2. Seniors who are capable of managing their affairs ought to be able to make their own choices about what they do with their money, whether there are rules to protect them or not. The question of financial abuse will depend on the circumstances.
3. Financial abuse under the Act does not require a resident to feel victimized or abused, nor does it require harm to the resident.
4. Where there is a loan between a capable resident and an operator, formal steps to protect the resident may lessen concerns about financial abuse or meeting license standards. These steps include independent legal advice, a fair rate of interest, and written records.

Footnotes

- ¹ <www.statcan.gc.ca/daily-quotidien/150929/dq150929b-eng.htm>
- ² Pillemer, Burnes, Riffin & Lachs, M.S. (2016). Elder abuse: Global Situation, Risk Factors and Prevention Strategies. *The Gerontologist*, 56, S194-S205. doi:10.1093/geront/gnw004.
- ³ Hall, Karch & Crosby (2016), Elder Abuse Surveillance: Uniform Definitions and Recommended Core Data Elements, version 1.0, National Center for Injury Prevention and Control; Living Well, Living Longer (2012). Report submitted to Minister of Health and Long-Term Care to Inform a Seniors Strategy for Ontario.
- ⁴ National Center for Injury Prevention and Control, *Elder Abuse Surveillance* (Atlanta: 2016) at 35.
- ⁵ By way of example, the Ontario Securities Commission has struck a Seniors Expert Advisory Committee to look at the issue <www.osc.gov.on.ca/en/NewsEvents_nr_20160907_osc-announces-seniors-expert-advisory-committee.htm>
- ⁶ Law Commission of Ontario, A Framework for the Law as it Affects Older Adults (Toronto: 2012)

⁷ *Ibid* at 55.

⁸ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. N. (R.)*, 2016 CarswellQue 13351, EYB 2016-276488, 2016 QCTDP 24 (T.D.P.Q.) at para 246.

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