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Tribunal Provides Guidance on Financial Abuse of Elderly

April 21, 2017

Overview

Canada has an aging population with more Canadians over the age of 65 than under the age of 15. As the population of older Canadians grows, so does the concerns for elder mistreatment, most commonly financial abuse. Despite this issue being a serious public health concern, the topic has rarely crept into the legal lexicon.

More recently, Law makers, regulators, and adjudicators have begun to turn their minds to financial abuse of older adults. Paving the way is 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 from abuse by anyone. The regulation under the Act defines "financial abuse" as "any misappropriation or misuse of a resident's money or property". The Act is silent about loans from a resident to the licensee. The question of whether taking such a loan is financial abuse was central in Seeley's Bay.

Facts and Conclusions

Seeley's Bay concerned an appeal of the Retirement Homes Regulatory Authority 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 facts surrounding the 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 a lawyer and a written mortgage with a reasonable rate. VC Sanford would not have characterized these circumstances as financial abuse.
2. Residents 1 and 2 were a couple who had come to regard the licensee as a son. When he came to them in need of money, they offered a loan through prepaid rent. 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.VC Sanford found that the licensee did not financially abuse the residents. She noted that 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 taking the loans as abuse, she did find that it showed a lack of integrity that fell below the standards expected of licensees.
3. Resident 3 lived at the home for 6 years. She died shortly before the hearing. She was capable and managed her own affairs. 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.The resident's health started to deteriorate in 2016. She worried that she would need more care and not have funds to pay for it. She was concerned about the lack of

paperwork and that she had lost track of the money owing to her. She worried that the licensee didn't take action when she approached him about repayment. Some of the loan remained unpaid at the time of her death.VC Sanford found that the licensee subjected resident 3 to financial abuse. She noted that no interest was paid while the licensee applied the loans to his own use. He did not repay the loans on request. To VC Sanford, this was "misappropriation" of resident money under the Act.

Financial Abuse in Congregate Care

VC Sanford's findings relied in part on expert evidence. The evidence related to the risks that the elderly face with respect to financial abuse. The normal process of aging affects the ability to make financial decisions and to avoid contexts that lead to abuse. In retirement homes, the elderly may face greater risk of abuse because they depend on the home for housing, safety and care. This dependency creates an expectation of trust between resident and operator. Factors such as impairment and isolation increase the risk of abuse. Given this context, VC Sanford stated that 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 abuse. Where a resident is competent, the question of financial abuse will depend on the circumstances. She did not find abuse where a competent resident gave a loan as a matter of friendship. The view that regulation should not unduly constrain the choices of a competent senior is in keeping with the Law Commission's warning that the association of older adults with vulnerability may lead to paternalism.

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 to manage 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 lesson concerns about financial abuse or meeting license standards. These steps include independent legal advice, a fair rate of interest, and written records.

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