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### **VULNERABLE PERSONS: PROTECTION AND REMEDIES IN CANADA**

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**Release No. 1, July 2022**

#### **Publisher's Special Release Note 2021**

The pages in this work were reissued in November 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the Release 2, November 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This reference work guides the practitioner through all aspects of law and practice related to vulnerable persons in Canada. This book is the first Canadian legal text on this subject, and is conveniently organized so the user can quickly access the legal remedies available for the protection of persons in vulnerable circumstances in the common law provinces of Canada. The four types of vulnerable persons are discussed in this book and organized by chapter: youths who fall outside the scope of child protection laws and adults who suffered child abuse, spouses, the elderly, and medical patients and persons with disabilities.

### **What's New in this Update:**

This release features updates to the case law in Chapter 2, *Youth Protection and Childhood Remedies*; Chapter 3, *Spousal Protection and Remedies*; Chapter 4, *Protection of the Elderly and Remedies*; and Chapter 5, *Protection of the Disabled / Patients and Remedies*. New section topics include the *Powers of Attorney Act* and Criminal Proceedings in Chapter 4.

### **Highlights:**

**Youth Protection and Childhood Remedies — Costs against the Society** — A mother was denied legal aid funding, so she brought a motion for state funding. In advance of the motion, the mother served an offer to settle. She was awarded state funding, and after receiving submissions on costs the motion judge awarded costs against the Society on the basis that the Society acted unreasonably in opposing the motion. The Society appealed. The motion judge found that the Society acted unreasonably in failing to accept an offer to settle made by the respondent, and in taking a position on the merits of the appeal when it was “patently clear” that the appeal had merit and that the appeal engaged the respondent’s Charter rights. In the appellate court’s view, it was an error for the motion judge to consider the offer to settle. In addition, the fact that the Society took a position on the merits of the appeal was insufficient to ground a finding that the Society acted unreasonably on the motion. Looked at in isolation or in combination, the factors that led the motion judge in this case to find that the Society acted unreasonably did not support his finding. He should not have taken the offer to settle into consideration. In addition, all motions for state funding engage issues of access to justice and section 7 Charter rights as well as requiring an assessment of the merits of the appeal. It may have been an error in judgment for the Society to take the position that this appeal had no merit given the low bar for the merits test. However, taking an ill-advised or overly stringent position on a legitimate legal issue cannot be sufficient to ground a costs order against the Society. Something more is required. There was no basis in this case for finding that the Society’s conduct was unreasonable or unfair, and the motion judge’s decision was therefore clearly wrong. The appeal was allowed: *Children’s Aid Society of the Region of Peel v. L.M.*, 2021 ONSC 1699, 2021 CarswellOnt 4355 (Div. Ct.), reversed 2022 ONCA 379.

**Spousal Protection and Remedies — Claim for damages** — At trial, the Justice awarded the mother \$150,000 in “compensatory, aggregated, and punitive damages for the tort of family violence.” In doing so, the Justice

acknowledged that such a significant damage award was “well-outside the normal boundaries of family law.” However, her reasoning for doing so was that the parties’ marriage was not typical, as it was characterized by violent abuse and “a sixteen-year pattern of coercion and control.” The Justice opined that such a pattern of abuse could not be compensated through an award of spousal support, especially since s. 15.2(5) of the Divorce Act specifically precludes the court from considering “misconduct” when making a spousal support award. As a result, she held that the mother was entitled to a remedy in tort. The Justice also set out the test for this new tort, to be proven on the balance of probabilities. For a successful claim, the plaintiff must prove conduct by a family member towards the plaintiff, within the context of a family relationship, that is violent or threatening, or constitutes a pattern of coercive and controlling behaviour, or causes the plaintiff to fear for their own safety or that of another person. The tort of family violence is distinguishable from the torts of assault and battery due to the “cyclical and subtle” nature of the coercion and control found in family violence cases, and the involvement of “complicated and prolonged psychological and financial abuse.” As noted by the Justice, assault and/or battery are generally focused on specific, harmful incidents, while the proposed tort of family violence is focused on long-term harmful patterns of conduct that are designed to control and terrorize: *A. v. A.*, 2022 ONSC 1303, 2022 CarswellOnt 2367 (S.C.J.), additional reasons 2022 ONSC 1549 (S.C.J.), additional reasons 2022 ONSC 2169 (S.C.J.).

**Protection of the Elderly and Remedies — *Substitute Decisions Act* —**

The Applicant lived in a long-term care facility and suffered from dementia. Her litigation guardians brought an Application for finding that her late husband had breached fiduciary duty when acting as power of attorney, and for his estate to pay damages. The Respondents were all beneficiaries of the late husband’s estate. In November 2011, the Applicant signed a Continuing Power of Attorney, appointing her husband as her attorney for property. In November 2012, the Applicant was required to move into a long-term care facility as she had a diagnosis of Parkinson’s Disease, Alzheimer’s Dementia, and Type II Diabetes. On December 17, 2012, her husband severed the joint tenancy of the property that was previously jointly held by both of them, thereby changing the ownership so that each owned a 50% share, as tenants in common. He moved into a long-term care facility in 2014. On March 31, 2014, he sold the property for the sum of \$700,000. The net proceeds of that sale were all paid entirely to him. He died in July 2015 and in his Will dated June 17, 2014, he made no provisions for his wife. Instead, he divided his estate evenly between his siblings. The Applicant died after this Application had been commenced. In accordance with ss. 32 and 38 of the Substitute Decisions Act, the judge found that it was clear that the husband owed a fiduciary duty to his wife because he had been appointed as her attorney for property. The medical records showed that his wife was unable to manage her property well before the husband sold the property. Accordingly, he owed her a fiduciary duty when he sold her share in the property. The judge found that the husband did breach his duty to his wife. When acting as a fiduciary under a power of attorney, the attorney can only act for the benefit of the donor. The attorney is prohibited from using the power for their own benefit without the full knowledge and consent of the donor. If the donor is mentally incapable, the attorney’s position approaches that of a trustee. The husband breached his fiduciary duty to his wife by keeping for his own benefit her portion of the proceeds of the sale of the property. Remedies for breach of a fiduciary duty are discretionary, depending on the facts before the court, and generally have two goals: restitution and deterrence. Given the fore-

going, the judge ordered that the husband's estate pay the wife's estate her 50% share of the proceeds of the sale, plus interest: *Angeloni v. Estate of Francesco Angeloni*, 2021 ONSC 3084 (S.C.J.).

**Protection of the Disabled/Patients and Remedies — Other civil claims and applications** — In a multiparty action against two doctors and the Crown, the plaintiffs sought general damages, punitive damages, and, for some plaintiffs, income loss. The plaintiffs were patients at a maximum-security mental health hospital for which the Ontario Crown was responsible. The plaintiffs were in the hospital on an involuntary basis and were subject to experimental psychiatric programs. The first program consisted of a mind-altering drug regime. The second program involved the use of soundproof, windowless and constantly lit isolation cells for group encounters which included hallucinogenic encounters where the plaintiffs were restrained or strapped to each other. The third program was a physical disciplinary regime in which the plaintiffs were required to sit motionless for hours on a cold floor. The plaintiffs claimed there was a breach of fiduciary duty by their doctors and the Crown. The Court found that the Crown breached their fiduciary duty to the plaintiffs and the Crown and doctors were liable to the plaintiffs for having caused them varying degrees of harm. In determining the amount of damages to award the individual plaintiffs, the Court acknowledged that there is a cap on general damages and the limit for such damages is set at \$100,000. The Court stated that there is a cap on damages for policy reasons, which includes social considerations and the fact that there are insurance premiums. However, the Court also noted that the policy considerations for the cap on damages did not exist in this case as there was a breach of fiduciary duty with respect to patients which involved psychiatric injury rather than physical injuries. Further, there were no cost of care claims, given the plaintiffs brought their claims approximately 40 years after the fact. The Court also noted that there was judicial precedent for them to not abide by the cap on damages when there was a breach of fiduciary duty. The Court determined that, based on the unique context of the wrong suffered by the plaintiffs, the intentionality of the wrongdoers, and that there are few, if any, social costs or society-wide implications to the claim, they were able to award damages in excess of the cap on general damages. The Court found in favour of the plaintiffs who were awarded damages on an individual basis: *Barker v. Barker*, 2021 ONSC 158, 2021 CarswellOnt 1458 (S.C.J.), additional reasons 2021 ONSC 4275 (S.C.J.).

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