

# Southwest Virginia Legal Aid: Elder Abuse Conference

## Capacity Issues for Cases Involving Elder Abuse

Presented by Futures Without Violence & The National  
Clearinghouse on Abuse In Later Life

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*Formerly Family Violence Prevention Fund*

# Introductions

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- Faculty
  - Hon. Janice Martin (retired)
  - Dr. David Franklin

# Learning Objectives

As a result of this session, you will be better able to :

- Identify how elder abuse may manifest and arise in cases involving guardianship;
- Identify a framework for guardianship determinations that prioritizes the autonomy and civil rights of older adults while also minimizing the opportunity for and impact of elder abuse.

# Poll

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- Indicate the frequency with which you encounter elder abuse cases in your professional role:
  - Very frequently
  - Frequently
  - Once in a while
  - Rarely
  - Almost never

# Using the Chat Box

- If you do see elder abuse cases, what are the most common forms of abuse that you have seen (i.e., physical abuse, financial abuse, etc.)?

# Intro to Anne

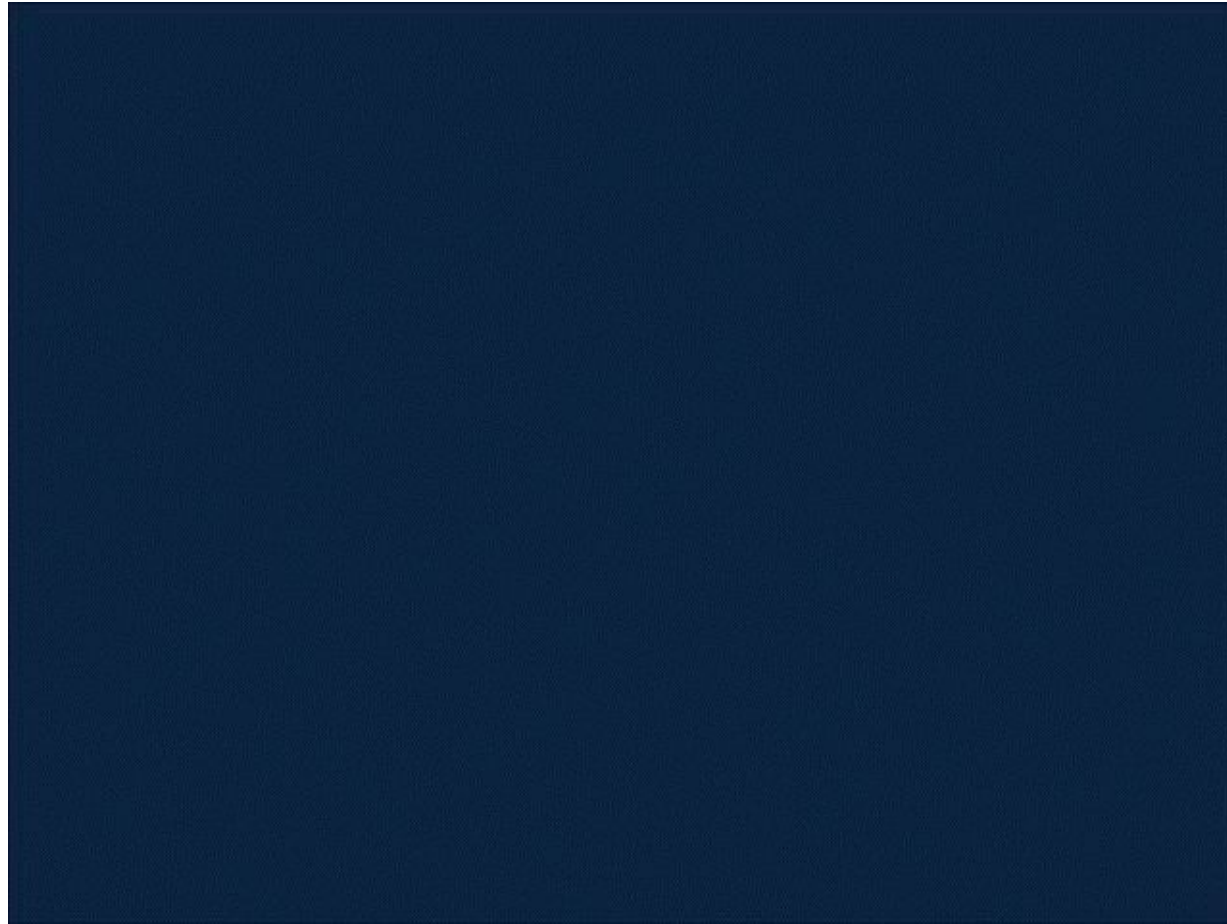
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We will watch a 5 minute clip of Anne

- Listen for types of abuse she suffered
- Listen for what is controlling her
- Listen for how it made her feel

# Video: Anne

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# **Debrief: Anne (Using Chat)**

- What types of abuse did she experience?
- What seems to be controlling her?
- How does she seem to feel about her situation?



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## Mini-Lecture: Abuse Against Older Adults

- Abuse often co-occurs
- When Anne was asked, she reported that he “never laid a hand on her” and was not verbally abusive to her. However, in the beginning she described him as “taking over her mind.”

# Mini-Lecture: Abuse Against Older Adults (2)

- Elder abuse is when an older adult experiences: physical, sexual, emotional abuse, neglect, or financial exploitation
- Victims are any older adult but disproportionately affected:
  - Persons who are isolated, living in poverty, or who have cognitive impairments
  - Women
- Perpetrators are most often family, caregivers, or those with whom victim has an expectation of trust= makes these cases harder to report, prosecute, and provide assistance.

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# Mini-Lecture: Abuse Against Older Adults (3)

- Why does elder abuse occur and persist?
- Greed
- Power and control
- Structural/ social issue (Social interactions; Resources and support; "Deterioration Model of Aging"—fatalistic perception of what it means to grow old in society)

# Manifestation of Greed

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- Abuse of fiduciary responsibilities
- Petitions for guardianships/conservatorships
- Coercion to sign POAs
- Theft fraud
- Conversion
- Other

# Manifestation of Power & Control

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- Similar to what is seen in DV cases
- Sense of entitlement to the time, attention, and possessions of the older adult
- Abuser is often dependent on the older adult for financial reasons, care and comfort
- Endorsed by society; supported by ageism

# Returning to Anne

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- Assume that early on after Anne's son moved back in with her, he filed a petition for guardianship asking for the full array of rights and powers available to care for Anne and her finances.
- Using the chat: What types of information do you want/need to make this decision?

# Capacity and the Legal System (1)

- US: appointment of guardian only with a finding of “incapacity”
- Law starts with a presumption of capacity
- 4 varying tests of incapacity under state guardianship laws:
  - Disabling condition
  - Functional behavior as to essential needs
  - Cognitive functioning
  - A finding that it’s necessary and least restrictive alternative

# VA Guardianships

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- "Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition.



# VA Guardianships (2)

- "Guardian" means a person appointed by the court who has the powers and duties set out in § [64.2-2019](#), or § [63.2-1609](#) if applicable, and who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian."

# VA Guardianships (3)

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- A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence. A guardian shall not unreasonably restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship.

# **Mini-Lecture: Cognitive Decline (1)**

- Can be caused by disease of the brain or in the absence of disease
- Aging brain associated with decline of fluid intelligence
  - Enables us to hold multiple pieces of info in our mind; and
  - Apply rules or logic to them to make decisions
  - Very important in financial decision-making

# Mini-Lecture: Cognitive Decline (2)

- Decline in fluid intelligence may not impact ability to care for oneself
- As fluid intelligence declines, crystalline intelligence remains intact or increases
  - “store of knowledge”
- Alzheimer’s, Dementia, and Mild Cognitive Impairment (MCI) can also cause cognitive decline

# **Mini-Lecture: Cognitive Decline (3)**

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- MCI
  - Less severe than dementia
  - Do not show significant changes in activities of daily living
  - About 1/3 of people with MCI will develop dementia within 5 years

# Mini-Lecture: Cognitive Decline (4)

- Dementia
  - Risk rises with age
  - Nearly ½ of those over 85 have Alzheimer's or another form of dementia
  - This is also the fastest growing segment of our population

# Large Group Discussion

- What does this mean in terms of older adult litigants & Anne?

# Capacity Concepts:

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- ❑ Capacity--continuum of decision making abilities
- ❑ Capacity is situational
- ❑ Capacity is contextual
- ❑ Varies by complexity of the task to be done or decision to be made
- ❑ The more significant the decision and the consequences of the decision, the higher the level of capacity required



# **The goals in guardianship cases are to:**

- Decide capacity in a manner that balances well-being with rights.
- Promote self-determination.
- Identify less restrictive alternatives.
- Provide guidance to guardians.
- Make determinations of restoration.
- Prevent undue influence.

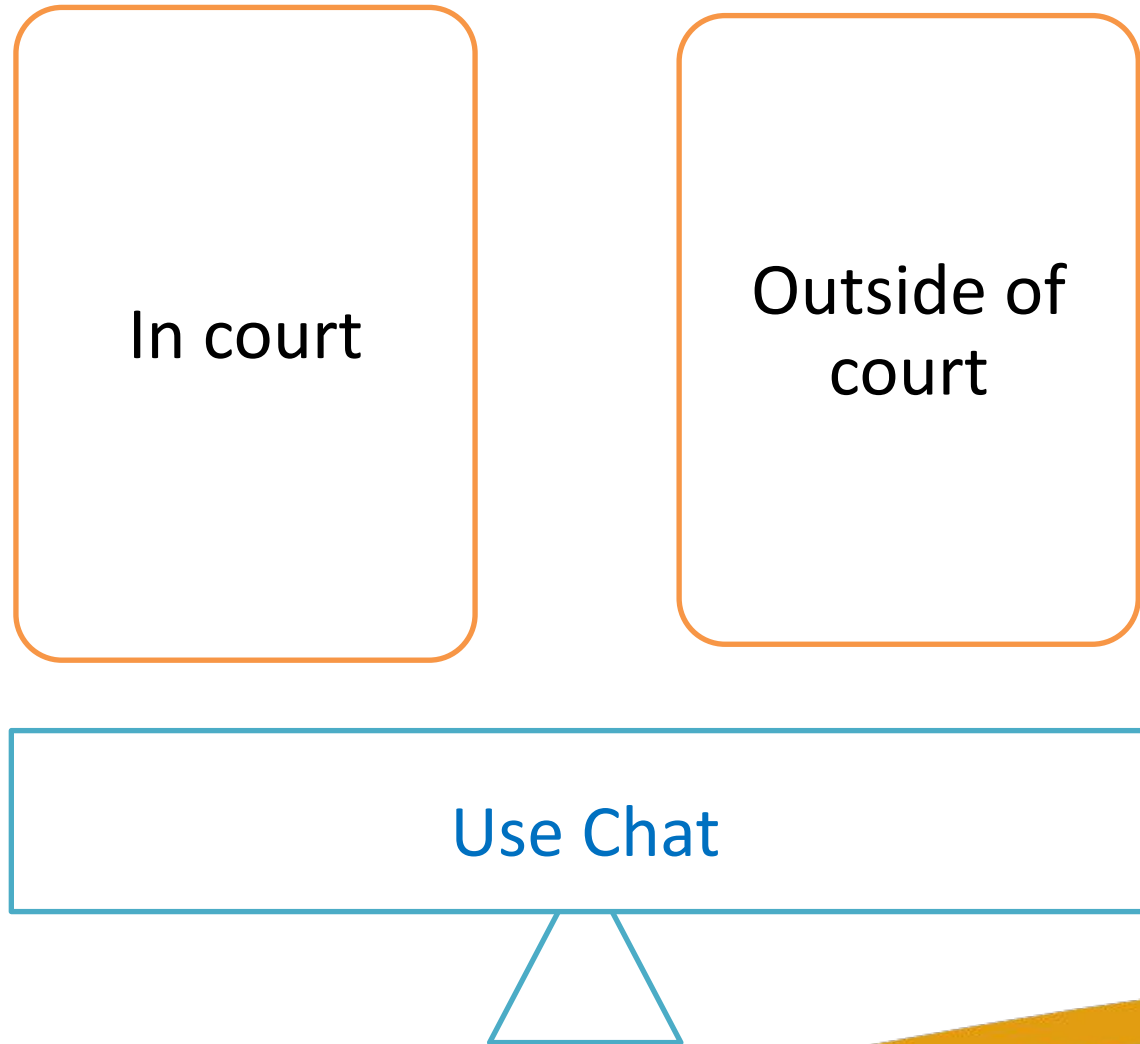
# A Question-based Road Map:

- What is bringing this case to court now?
- Have all procedural requirements been met?
- Is guardianship necessary and helpful?
- Is this a case of a temporary or emergency guardianship?
- What do the reports (GAL/clinical evaluator) suggest?
- Where else can I obtain information?
- What are my observations of the subject in court, if he or she is there?
- What is the medical cause of the alleged incapacity? Abuse related?

# Question Based Road Map (2)

- In what areas are the individual's decision-making impaired and to what degree?
- What can he or she do in terms of daily activities? Retained abilities?
- Does the individual want a guardian?
- Are the subject's choices consistent with long held patterns or values?
- What is the level of supervision needed?
- What is expected of this guardian?
- When should the subject's capacity be reviewed again?
- How often should the guardian's actions be reviewed?

# CHAT: What Can You do for Older Survivors?



# In Court

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- Ensure access to advocacy
- Ensure civil rights are respected
- Consider capacity, if indicated
- Appoint attorney/GAL (if indicated)
- Respect wishes and autonomy
- Refer to services
- Use trauma-informed language and demeanor
- Recognize common trauma reactions, including possible self-medication, substance abuse, or challenges tracking information or following plans
- Address acute financial/housing crises

# Out of Court

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- ◆ Consider how accessible your court is and involve older adults in seeking recommendations for improvements
- ◆ Make sure outreach materials and referral info depicts older adults and includes services that help older adults
- ◆ If no orgs are serving older adults, reach out to the DV/SA groups and ask that they consider expanding and adapting their services

# Outside of Court

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- Find out the options for treatment in your area:
  - According to Emerge, about 9-10% of their batterer intervention program participants are there for elder abuse.
- Lead court/community cross-trainings
- Become involved in coordinated community response (CCR) teams or task forces
- Oversee actions of guardians

# Questions

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Use Chat