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# Elder Abuse and the Court System OIL AND VINEGAR?

By Bernard A. Krooks and Elizabeth Valentin

**W**ith the aging of the baby boomers and increased life expectancies, the number of seniors in this country will grow dramatically within the next few years. With that growth will also come a rise in elder abuse due to the inevitable complex of needs and problems associated with the increase of this vulnerable population. Elder abuse is embedded in the common fragilities of many older adults. The physical, cognitive, and emotional changes that come with aging can increase an older person's vulnerability to abuse.

There is currently no national accord on the definition of elder abuse; each state's definition varies extensively

from the other. However, the term elder abuse is generally defined as the physical, sexual, or emotional abuse; financial exploitation; neglect; or abandonment of a senior.

## **The Hidden Crime**

This type of abuse is often referred to as a hidden crime. It is referred to as such for a number of reasons. First, for every case of elder abuse reported, many more go unreported. Elder abuse and financial exploitation are largely uncontrolled problems. Second, the majority of the abusers are family members or those in a close relationship with the elderly person, which often dissuades the senior

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from reporting the abuse. For example, a mother being abused by her son might not want to see him go to jail and, as a result, may never tell anyone about the abuse. She may also be humiliated by, or ashamed of, the abuse, and so she may keep it to herself. Third, the capacity of the senior, affected by the abuse and perhaps other illnesses causing further capacity deterioration, may make the ability to prosecute the case challenging. Lastly, very few cases are in fact prosecuted, given the lack of specificity in the legal definition of elder abuse and the difficulty in proving the senior's actual vulnerability. As a result, many instances of elder abuse go unreported and as such unaddressed.

All states have some variation of adult protective services law and civil or criminal laws that are applied to cases of elder abuse. However, with differences in the laws and insufficient reporting mechanisms, the majority of elder abuse cases go on without much, if any, resolution. As this problem becomes increasingly more apparent and widespread, many on the national, state, and local levels are working toward transforming the current resources in place for new paradigms integrating increased social services and better oversight of the adult guardianship system to tackle and reduce elder abuse and care for its victims. Courts, when presented with this issue, have an obligation to protect the vulnerable senior, and they commonly do so through the use of adult guardianships, known in some states as conservatorships.

### **Guardianship Proceedings: One Source of the Problem?**

A guardianship involves confirming that an individual lacks the mental capacity to handle his or her affairs, personal and/or financial, and requesting that a court appoint a guardian to make decisions on behalf of the person alleged to be incapacitated. Many faced with trying to combat a case of elder abuse will likely be presented with this form of legal recourse to consider. There is both a strong and ironic relationship between elder abuse and the use of the guardianship system. Often, a guardianship may be necessary to stop elder abuse, as is the

case when it is needed to obtain medical attention for an incapacitated victim of neglect or to remove that person from the control of someone financially exploiting him or her. However, at other times, the guardianship itself may be the source of the abuse. There has been much criticism lately surrounding the nation's guardianship systems, and reform is slow to address these issues. Many feel that the current guardianship system in most states is often ineffective, open to abuse, and rife with the exploitation of seniors' civil rights.

### **Systemic Failures**

Various factors play into how effective a guardianship will be to combat a particular case of elder abuse. Systemic failings may place the vulnerable senior at a disadvantage when he or she is the subject of a guardianship proceeding. Many of these are attributable to the structure of the proceedings, the legal standard for incapacity, and the realities of court administration. All of these may converge and explode in instances of elder abuse and profoundly obscure the senior's capacity when attempts are made to assess capacity and to do so with reasonable accuracy. For example, a victim's capacity to make decisions for himself or herself is directly impacted by the degree to which the abuser is involved in those decisions. The difficulty here is that there is no bright line; capacity exists on a gradient. Capacity is complex and affected by a great many things, such as the mental and physical stress an individual is experiencing. As a result, it is quite possible for an individual to possess capacity under certain circumstances and not in others. Elder abuse can exacerbate emotional and cognitive impairment, which can often present as the inability to make decisions. As such, many cases of elder abuse find their way into guardianships.

### **Determining Capacity**

The task of ascertaining the person's capacity lies at the core of these guardianship cases. However, it is a difficult task to decipher if the person's alleged lack of capacity is simply due to the abuse, in which case, once removed from the abusive environment or relationship, he or



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she can and should be able to continue making decisions without the assistance of a guardian. Or the question may be, does this senior, in fact, lack capacity and require the assistance of a guardian? The problem with the use of guardianship to address elder abuse lies in the identification of whether the appointment of a guardian is appropriate for someone who simply needs assistance out of the abusive environment or relationship, rather than a guardian to make all decisions on his or her behalf going forward. It requires a true investigation into capacity.

#### ***Tailoring Guardians' Powers***

Moreover, due to overburdened dockets, courts do not always specifically tailor the guardian's powers to ensure that the guardian may only exercise those powers needed to address the issue before the court. Rather, they allow for the use of general, boilerplate powers that end up stripping the victim of decision-making authority that he or she may still

guardian. Many guardians do not have any legal or mental health training. Few take interest in the victim's care plan or whether the victim can participate in his or her own decisions. Every state has some form of a required reporting system wherein guardians must account for their actions, both financial and medical, or their lack of action. However, in most states, when the average guardian does not file his or her report in a timely matter, there are no true consequences for that guardian. Some courts do not even require the report to be approved. Often, there is no follow up by the court or the court is delayed in its follow up. While many guardians are well-intentioned and not actively hurting their wards, they may not be fulfilling all of their required duties as guardian, including those of visiting with their wards and prudently managing their finances.

This lack of monitoring makes it evident that the statutory scrutiny and reporting requirements can be stretched

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## The courts' failure to appropriately monitor guardianships has left many seniors vulnerable to elder abuse.

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be capable of exercising. This is especially problematic for those victims of elder abuse who have specific gaps in capacity due to the trauma of the abuse. Elder abuse is complex, and the disparity between the statutory ideal of guardianships and the realities of their administration does not add up to quick resolution of the abuse.

#### ***Oversight of Guardians***

There are also additional risks faced by elder abuse victims even after a guardian is appointed. Most guardianship statutes are administered in such a way that there are a number of gaps in the oversight mechanisms, and opportunities exist for negligence by guardians. In many instances, there is outright abuse.

Unfortunately, due to an overtaxed and underfinanced guardianship system, victims of elder abuse do not often get the protection they should receive under the statute—even after the appointment of a

or even ignored without consequence. The courts' insufficient oversight of guardianships has proven ripe with opportunities for guardians to financially exploit and/or neglect the victims for whom they were appointed.

#### **A Complex and Multilayered Problem**

The identifying, reporting, and addressing of elder abuse is complex and multilayered. As guardianship is a commonly used recourse for elder abuse, victims are particularly vulnerable to the flaws in the system as it is currently administered. The failure of the courts to appropriately monitor guardianships has left many seniors vulnerable and exposed to elder abuse, even after allegedly protective measures have been taken. ■