



Hot Topics in Elder Law

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Common Areas of Law/Concern

- **Health Care**

- Medicaid Eligibility
- Nursing Home Medicaid Eligibility
- QMB

- **Economic Security**

- LIHEAP/Public Utility
- SNAP/Food Stamps
- SSI Non Disability

- **Consumer**

- Public Utilities
- Collection
- Other Consumer Finance

- **Housing**

- Homeowner/Real Property
- Mortgage Foreclosure
- Public Housing Access

- **Family**

- Family Violence TPO
- Guardianship Children
- Birth Certificate

- **Life Planning**

- Wills
- Georgia Advance Directive for Healthcare
- Financial Powers of Attorney
- Estate/Probate

Core Cases- OAA Funded Programs

1. Miller Trusts
2. NH Medicaid
3. Medicaid Eligibility
4. NH Discharge
5. ANE – Financial Exploitation
6. SS/SSI: OP; Termination or Reduction; Disability
7. Garnishment
8. SNAP/Food Stamps
9. Collections
10. LL/T Evictions (Public & Private)
11. Housing/Homeowner
12. CCSP Medicaid
13. Other LTC Issues: Residents' Rights; PCH Discharge; Assisted Living
14. Mortgage Foreclosures and Modifications
15. Name Change/Birth Certificate
16. Bankruptcy
17. Guardianship Defense

Emerging Issues

- ▶ Reactive Practice
- ▶ Disaster Relief
- ▶ Homelessness
- ▶ Tax Reform/Relief
- ▶ Health Care Reform
- ▶ Pro Se Litigants
- ▶ Unbundled/Low bono
- ▶ Proactive Lawyering
(“Upstream” Efforts)
- ▶ Specialty Courts
- ▶ Incapacity Planning
- ▶ SDM Arrangements
- ▶ Heir Property Title Issues
- ▶ Gentrification of low income urban areas/ land use in rural areas

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Executive Director
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Supportive Housing with a Lens on Homeless Older and Elder Adults



Who is an “Elder”?



Housing Insecurity and Homelessness



Who are homeless older Adults?



Geriatric Conditions



Good news!



What is supportive housing?



- ▶ **Emergency shelter** – short term bridge housing for all
- ▶ **Transitional housing** – long term temporary housing (6-24 months) with intensive services.
- ▶ **Rapid rehousing** – short or medium term, flexible financial assistance and services to quickly re-house and stabilize individuals and families
- ▶ **Permanent supportive housing** – housing that combines non-time-limited housing assistance with wrap-around supportive services.

There are a variety of needs

- ▶ Supportive services for physical disabilities
- ▶ Mental illness
- ▶ Intellectual and Developmental disabilities
- ▶ Youth aging out of foster care
- ▶ Reentry from incarceration
- ▶ Substance abuse recovery
- ▶ Veterans
- ▶ Seniors/Elders



Support services



Permanent Supportive Housing

(Commons at Imperial, Atlanta)




In the City of Atlanta alone, chronic homelessness cost state and local taxpayers:

- \$24 million in Emergency Room visits;
- \$37 million for in-patient hospital stays;
- \$1.8 million in jail stays, and
- \$347,000 in misdemeanor arrests.

Source: Unsheltered No More, Innovation Delivery Team Report, City of Atlanta 2012-2013 in Regional Commission on Homelessness PPT 9/18/17

Evidence and Research





2016 HUD Performance Measure	2016 Atlanta CoC Performance
Percentage of exited participants with increased income at time of exit (all CoC funded projects)	43%
Percentage of participants exiting emergency shelter to homelessness/emergency shelter	85%
Percent of participants exiting transitional shelter to homelessness	52%
Percentage of PSH participants who either remained in PSH or exited to permanent destinations	91%

Source: Atlanta CoC, Partners for H.O.M.E.

Long Term Care Options, Residents' Rights, and the "Tsunami" of Nursing Home Evictions

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Long Term Care Options for Vulnerable Older Adults

- ▶ Publicly and privately funded supports and services to improve health care and quality of life.
- ▶ Options include adult day care, home and community based services, assisted living, and nursing homes.
- ▶ LTC options form a landscape, **not** a continuum in which the end point is always a nursing home. Consumers have **choices** and **move in and out of different options as needs and circumstances change.**



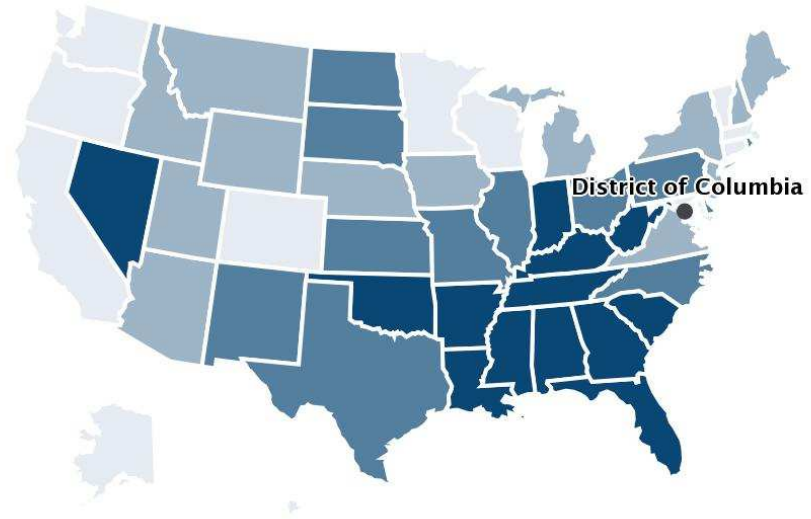
The Changing Face of LTC

- ▶ Nursing homes are an entitlement under Medicaid; home and community based services are optional.
- ▶ States are engaged in efforts to “rebalance” by increasing the percent of the long term care budget spent on hcbs.
- ▶ State investment in hcbs, and ltc choice and quality vary widely. See *AARP 2017 Long Term Services and Supports State Scorecard*.

Long-Term Services and Support Scorecard

Overall Ranking

● Top Quartile ● Second Quartile ● Third Quartile ● Bottom Quartile
● Series 2



What do long term care consumers want?

- ▶ Choice
- ▶ Control
- ▶ Quality
- ▶ Consistency
- ▶ Dignity
- ▶ Affordability/coverage by Medicaid, Medicare or private insurance
- ▶ Option to age in place/alternatives to nursing homes
- ▶ Flexible services that meet changing needs
- ▶ Security



Rights of Long Term Care Consumers



- ▶ Detailed, comprehensive body of nursing home residents' rights and facility requirements enumerated in federal law, may be additional rights in state law.
- ▶ Assisted living facilities not regulated by federal law. Terminology, licensing requirements (including ability to operate without a license), and resident rights vary by state.
- ▶ Home and community based "waiver" programs arise from federal Medicaid law but states negotiate details of their programs with federal government; benefits, eligibility, and rights vary.

Nursing Home Residents' Rights



- ▶ Federal nursing home regs revised & updated effective Nov. 2016.
- ▶ Important new consumer protections
 - ▶ Greater focus on addressing a resident's individual needs and preferences.
 - ▶ Expanded training requirements on topics including resident rights & abuse and neglect.
 - ▶ Improved protections against abuse, neglect and exploitation.
 - ▶ Better protection of resident property.
 - ▶ Increased visitation rights.
 - ▶ Better protection against evictions and resident "dumping."

Protection from Involuntary Discharge (Nursing Home Evictions)

- ▶ Federal law permits involuntary discharge only when:
 - ▶ Necessary to meet resident's welfare and welfare cannot be met in facility
 - ▶ Appropriate because resident's health has improved sufficiently
 - ▶ Health or safety of individuals in the facility would otherwise be endangered
 - ▶ Failure after reasonable and appropriate notice to pay (or have paid under Medicare or Medicaid)
 - ▶ Facility closes

42 C.F.R. §483.15 (2016)

Other required protections

- ▶ 30 day advance written notice (in most situations) that includes date of discharge, reason for discharge, location to which resident is to move, notice of appeal rights, contact info for advocacy orgs
- ▶ Specific documentation in clinical record
- ▶ Preparation for discharge
- ▶ No discharge while timely appeal is pending



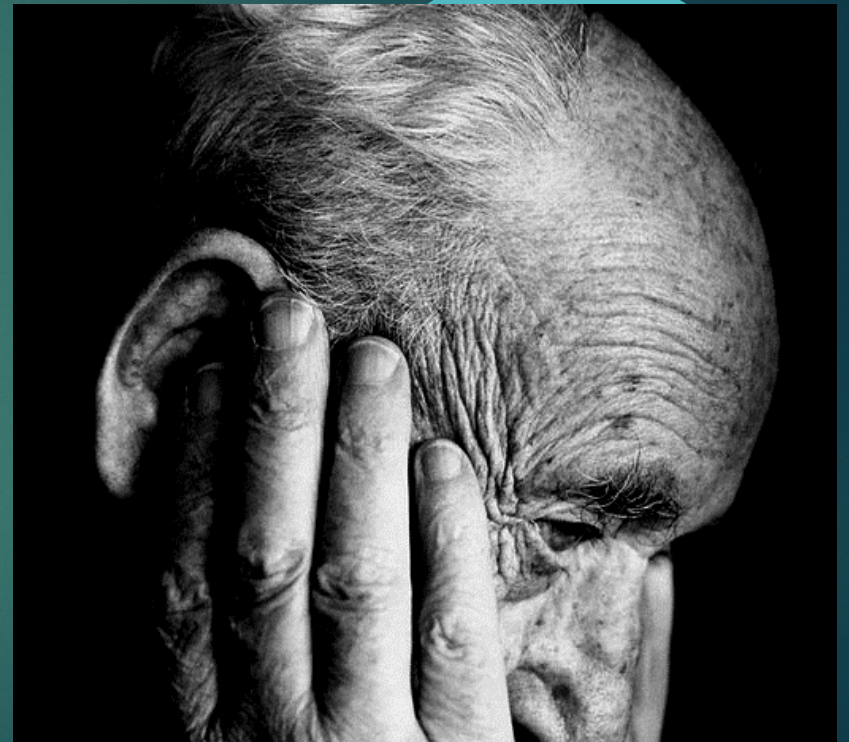
Struggling to Stay In

- ▶ **Despite strong law**, thousands of nursing home residents face involuntary discharge every year. Consistently among the top complaints ltc ombudsmen report.
- ▶ Sometimes residents receive formal notice; sometimes nursing facility residents persuaded to leave “voluntarily.”
- ▶ Facilities often send residents to hospitals and refuse to readmit (“resident dumping”).
- ▶ Many state licensing agencies offer weak enforcement of protections against evictions.



Who is most likely to face involuntary discharge?

- ▶ Individuals with challenging behaviors due to dementia, brain injuries, mental illness or other conditions.
- ▶ Residents with payment issues (often due to exploitation by or negligence of family or fiduciaries who fail to pay bills or apply for benefits)
- ▶ Residents who are (or whose families are) perceived as difficult or demanding.
- ▶ Individuals who require complex, "heavy," or expensive care.
- ▶ Individuals who were homeless prior to admission
- ▶ Individuals with substance use challenges or criminal convictions



Why are nursing home involuntary discharges so devastating?

- ▶ Resident loses his/her
 - ▶ Home
 - ▶ Familiar caregivers
 - ▶ Routines & activities
 - ▶ Roommate & community
- ▶ Usually, results in move to more distant, lower quality facility or lower level of care. Sometimes discharge to homeless shelter or relative's home.
- ▶ Residents often feel rejected, disoriented, depressed.
- ▶ Some residents face serial discharges.
- ▶ Studies document increased morbidity and mortality when residents are involuntarily discharged.

Case Study: Mr. A



- ▶ Mr. A, a brittle diabetic and recent amputee with multiple serious medical conditions, got behind on nursing home bill.
- ▶ Facility attempted to discharge to homeless shelter
- ▶ Mr. A. had no money, no food, nowhere to refrigerate his insulin, nowhere else to go until apartment became available in 2 weeks.
- ▶ Since homeless shelter was full and found him inappropriate, nursing home sought to roll Mr. A to the parking lot and refuse readmission
- ▶ Lawyers prepared request for injunctive relief , negotiated last minute settlement that allowed Mr. A to remain in nursing home for 2 weeks until his apartment was ready.

What will help stem the tide of improper involuntary discharges?

- ▶ Education for residents and families about residents' rights to remain in the facility.
- ▶ Better enforcement by state regulatory agencies of legal protections against involuntary discharge
- ▶ Increased representation of residents in appeals of involuntary discharges
- ▶ Opportunities for judges to learn more about resident rights and involuntary discharge
- ▶ Better training for facilities to help them respond appropriately to challenging residents
- ▶ Assistance to residents and facilities in working successfully with Medicaid and Medicare to avoid non-payment.
- ▶ Action by residents' guardians to ensure appropriate placement and care planning in facilities, hold facilities accountable, and ensure payment.
- ▶ Access to the broad array of long term care services to assure optimal placement for all consumers.

Tailored Orders and Supported Decision making

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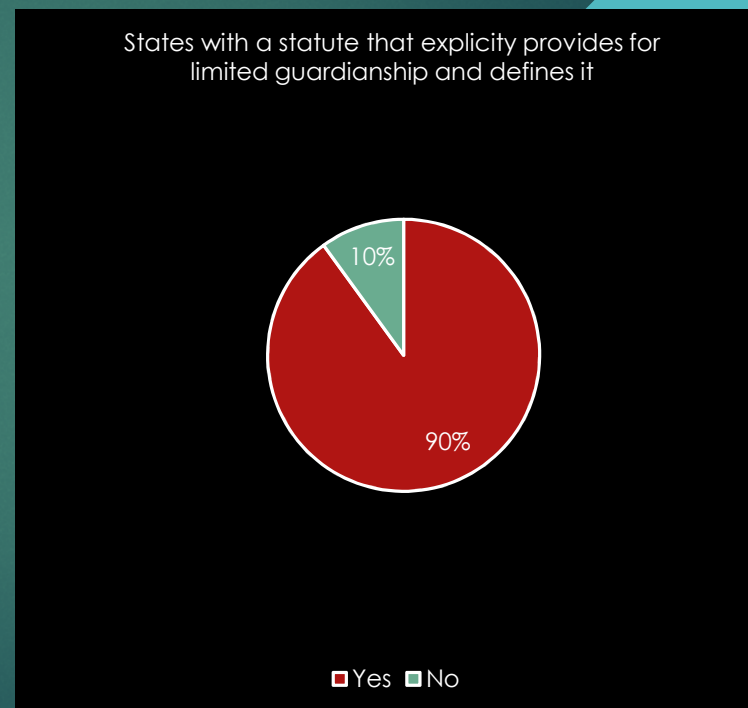
Gap Study on Barriers to Tailoring Orders

- ▶ Borchard Foundation Center on Law and Aging Research Project
 - ▶ Studied each state's statute
 - ▶ Case law on limited orders
 - ▶ Reviewed all prior studies of limited guardianship
 - ▶ Focus group identified common barriers
 - ▶ Opinion Poll on practical barriers



National Snapshot of Statutes Allowing Tailored Orders

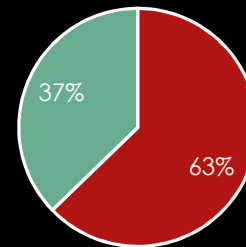
- ▶ Virtually every state allows for a limited order
- ▶ Even States that don't explicitly define have language that supports tailoring orders
- ▶ Three states have SDM statutes
 - ▶ Texas, Delaware, DC
- ▶ Uniform Law (new UGPPA) rewrite has SDM woven throughout
- ▶ Can work with other planning documents (HC directives, PADs, POAs)



Encouraging Independence

- ▶ Most statutes say protected arrangements should “encourage the development of maximum self-reliance and independence”
- ▶ What “can” people do successfully?
- ▶ How do we encourage this?
- ▶ Importance of functional evaluation

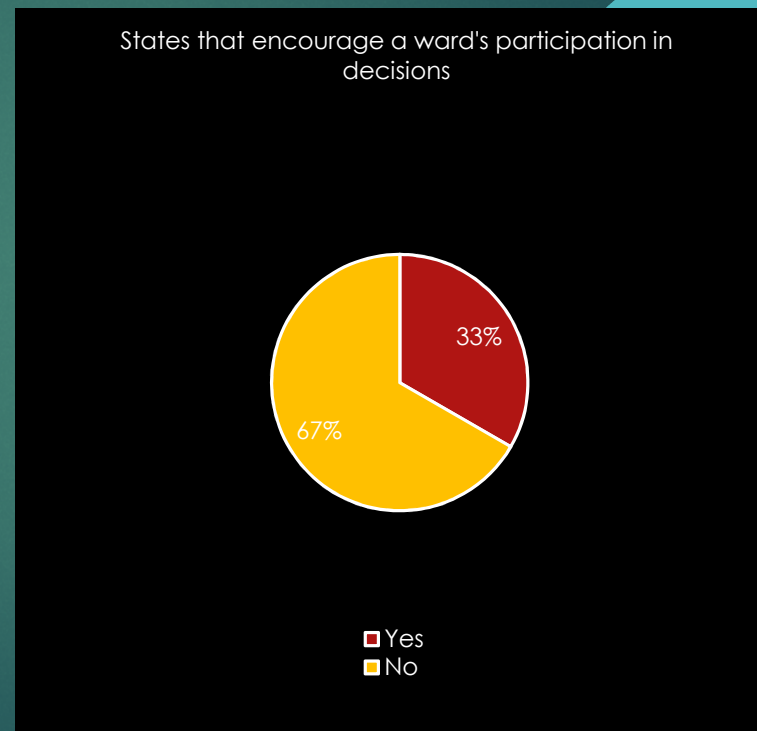
States with language encouraging the development of maximum self-reliance and independence



■ Yes ■ No

Participating in Decision Making

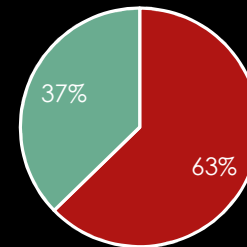
- ▶ Most state statutes do not have language explicitly encouraging participation in decisions
- ▶ But NGA Standards of Practice and Guardian Training Programs include



Preference for Limiting Orders

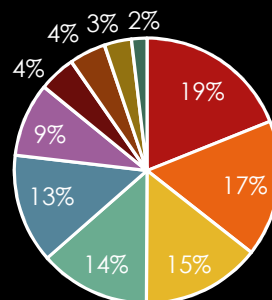
- ▶ Most statutes have language that include a preference for a limited or tailored order or require the petition to include a rationale for why it would not be appropriate
- ▶ But . . .most orders are not limited or tailored

States with a preference for limited guardianship or that require the petition to include a rationale for why a limited order is not appropriate



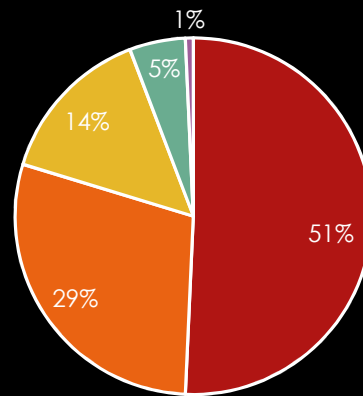
■ Yes
■ No

Barriers to limited guardianship



- Families cannot financially afford to come back to court if condition changes
- Problems with third party recognition (for example, health care provider or financial institution reluctance)
- Limited guardianship not requested by lawyer for alleged incapacitated person
- Not requested by petitioner
- Lack of a good assessment/evaluation
- Courts do not have sufficient resources (i.e., time, financial) to make adjustments if conditions change
- Judge unaware of options to limit
- Professional guardian caseloads make limiting impractical
- Public guardian case loads make limiting impractical
- Not allowed under our state law

Barriers addressed in poll comments



- Implementation challenges
- Need for information
- Time and Expense
- Liability concerns raised by professionals and public guardians
- Clarity regarding rights retained

Lessons from Disability Community

- ▶ “Upstream” Planning
- ▶ Supported Decision Making Arrangements
- ▶ Micro boards and Circles of Support
- ▶ Within and Outside Court Processes
- ▶ Accommodations and Ethics



What is Supported Decision Making?

- ▶ Is a Mindset not a Method- a Paradigm not a Process
- ▶ Is an ALTERNATIVE to Guardianship or can be used within the guardianship process

Supported Decision Making assumes that:

- ▶ EVERYONE has the right to make choices, and
- ▶ EVERYONE needs help making decisions



Ask and Listen

- ▶ Is a triggering concern caused by a temporary circumstance or reversible condition?
- ▶ Are there steps to reverse condition or postpone decision until condition improves
- ▶ Community- Can concerns be addressed by connecting with community or family resources and making accommodations?
- ▶ What would it take to enable the person to make the decisions or address the concern?
 - ▶ Informal Supports
 - ▶ Community Supports
 - ▶ Accommodations/Technology
 - ▶ Personal Safety- avoid dangers, recognize and avoid abuse, plan for emergencies

Ask and listen (continued)

- ▶ TEAM building
- ▶ Identify strengths and limits
- ▶ Screen for Challenges
- ▶ Appoint legal supporter or surrogate consistent with person's values and preferences
- ▶ Limit any necessary guardianship petition or order
- ▶ Include growth clause
- ▶ Include revocation clauses or other protections



Is there an Immediate Problem?

- ▶ What is the trigger?
- ▶ Temporary situation?
- ▶ What can we learn from the triggering event?
- ▶ What has been tried?
- ▶ What has worked?



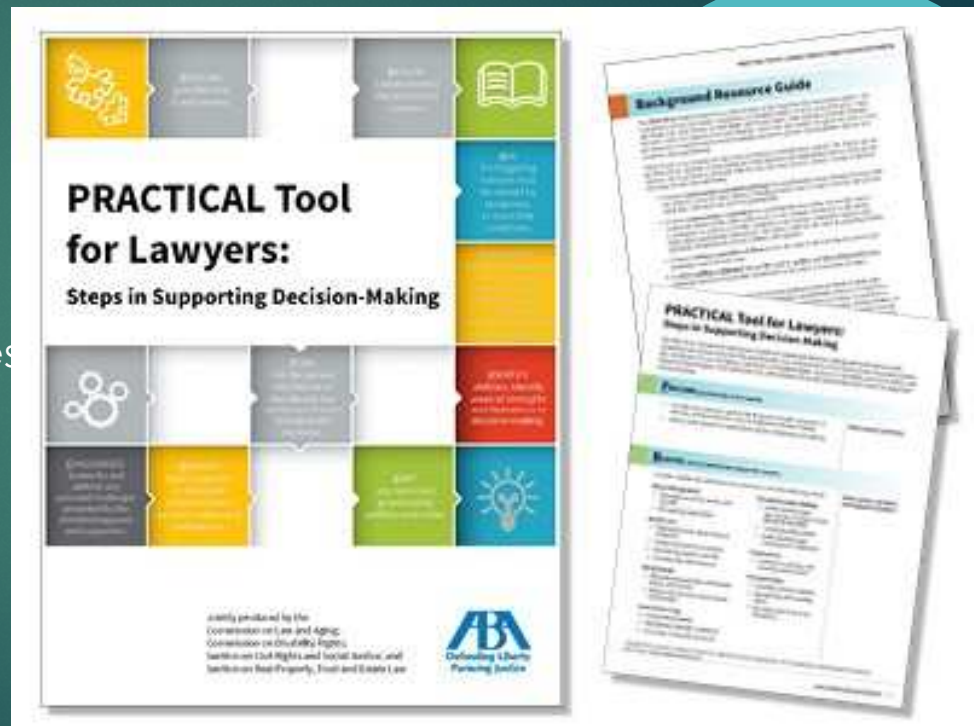
SDM for Person in Need of Support

- ▶ Expresses areas where needs help with decisions
- ▶ Expresses things that matter about these decisions
- ▶ Expresses who to help with decisions
- ▶ Expresses the types of help or values to guide the help



SDM for Lawyers

- ▶ ABA PRACTCAL Tool
- ▶ Easy screening checklist
- ▶ Helps explore client needs, abilities and goals
- ▶ Suggests Potential Alternatives
- ▶ Free from the ABA COLA



SDM for Judges

- ▶ What support do I think this person needs?
- ▶ What does the individual want?
- ▶ What evidence do I have of abilities?
- ▶ What else has been tried?
- ▶ Would other options work if tweaked?
- ▶ Can the person succeed with community support and resources?
- ▶ Growth or Revocation Triggers



Thank You!

- ▶ Don't miss the Plenary Session where you will learn about emerging Issues in the area of Elder Abuse, Neglect and Exploitation
- ▶ Fantastic Panel with National Experts
- ▶ Case study to demonstrate roles played by different agencies and courts
- ▶ 2:00-3:30 Today!

