

# 2002 Annual Meeting



## **Elder Abuse: Issues of Capacity In Substitute Decision Making** *(Federal Practice Track)*

3:15-3:45 p.m.

**Presentation by:**

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**Elder Abuse: Issues of Capacity**

**Deanna Clingan-Fischer, JD**  
**Iowa Department of Elder Affairs**

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**Dependent Adult Abuse**  
**Iowa Code 235B**

This law is specifically aimed at protecting dependent adults from abuse by his/her caretaker.

- 1983—initially effective
- 1988—Mandatory reporter language
- Report to: DHS or DIA

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**Reporting Abuse**

Community: DHS  
Local office or 1-800-362-2178

Licensed Health Care Facility: DIA  
515-281-4234 or 1-877-686-0027

Criminal Activity: Law enforcement

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## Concerns for Resident of LTC Facility

Long-Term Care (LTC) Ombudsman  
Office

1-800-532-3213

Resident Advocate Committees

Names posted in the facility

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## Reportable Criteria

1. The victim meets the definition of being a dependent adult
2. Is alleged to be the victim of one or more of the five categories of abuse or neglect
3. As a result of the acts or omissions of a caretaker or of the dependent adult.

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## What does Dependent mean?

Dependent Adult: A person 18 years of age or older who is unable to protect the person's own interests or unable to adequately perform or obtain services necessary to meet essential human needs, as a result of a physical or mental condition which requires assistance from another. §235B.2

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## Standard for Guardianship

The person's decision-making capacity is so impaired that the person is unable to care for their personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care without which physical injury or illness might occur.

Iowa Code §633.3(23)(a)

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## Standard for Conservatorship

The ward or proposed ward's decision-making capacity is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person's financial affairs

Iowa Code §633.3(23)(b)

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## Assessing Dependency Guidelines

- Is the person able to protect the person's own interests?
- Is the person at risk of injury, harm or being taken advantage of financially?
- Does the person require assistance with activities of daily living such as eating, grooming, taking medication, walking, toileting, dressing, food preparation?

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## Dependency Factors

- Physical—health problems, ADL's, communicate needs?
- Mental—diagnosis, oriented, reason and make conscious choices?
- Social—support, isolated?
- Environmental—safe, supervision or care for self?
- Financial—manage or others assisting?

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## What is abuse or neglect?

- Physical Abuse
- Sexual Abuse
- Financial Exploitation
- Denial of Critical Care/Neglect
  - By Caretaker
  - By Dependent Adult
- In LTC-Sexual Exploitation

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## Physical Abuse

Physical injury to, or injury which is at a variance with the history given of the injury, or unreasonable confinement, unreasonable punishment, or assault of a dependent adult.

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## Unreasonable Confinement or Punishment

Includes legally unauthorized, medically unwarranted, or improperly administered:

- Restrictions of physical movement, lock up, binding or chaining
- Sedative medication,
- Unwarranted, humiliating, or degrading acts directed at the dependent adult

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## Assault

- Any act intended to cause pain or injury or intended to result in physical contact which will be insulting or offensive, coupled with the apparent ability execute the act
- Any act intended to place the dependent adult in fear of immediate physical contact which will be painful, injurious, insulting or offensive with apparent ability to execute
- Intentionally pointing any firearm toward another or displaying in a threatening manner any dangerous weapon
- There does not need to be actual injury

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## Sexual Abuse

The commission of a sexual offense under Chapter 709 or section 726.2 with or against a dependent adult.

Includes:

1. First, second, third degree sexual abuse
2. Detention in a brothel
3. Indecent exposure
4. Assault with intent to commit and incest
5. Sexual exploitation by a counselor/therapist

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## Financial Exploitation

The act or process of taking unfair advantage of a dependent adult or the adult's physical or financial resources for one's own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of undue influence, harassment, duress, deception, false representation, or false pretenses.

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## INFORMED CONSENT

1. The dependent adult must understand the nature and general purpose of the task requested
2. Consent must be voluntary
3. The dependent adult must be mentally competent to give consent

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## UNDUE INFLUENCE

Any improper or wrongful constraint or urgency of persuasion whereby the will of a person is overpowered and that person is induced to do or refrain from an act.

Generally in a position of fiduciary capacity or a position of trust

When signing documents—exists when the will of one is substituted for the desires of another

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# HARASSMENT

Words, gestures and actions which tend to annoy, alarm and abuse (verbally) another person.

Intent is to threaten, intimidate or alarm.

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# DURESS

A condition where one is induced by wrongful act or threat of another to do something under circumstances which deprive him/her the exercise of free will.

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# DECEPTION

Intentional misleading by falsehood spoken or acted. Synonymous with fraud.

Knowingly and willfully making a false statement or representation pertaining to a present or past existing fact.

It is not necessary to be injured.

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## FALSE REPRESENTATION

- False statement
- That the wrongdoer knew was false
- Victim believed the statement
- Victim was injured
  
- Statement made for the purpose of inducing another to act

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## FALSE PRETENSES

- False representation of a material present or past fact which caused the victim to pass title to property to the wrongdoer, who
- Knows his/her representation to be false and
- Intends to defraud the victim
- Difference from deception & false representation: may be implied or may consist of concealment or non disclosure where there is a duty to speak.

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## Indicators of Financial Exploitation

- Disparity—income/assets and lifestyle
- Unpaid bills when resources are there
- Signatures that do not match
- Lifelong care agreements but no basics
- Signing legal documents—when capacity is questioned (wills, POA, Guardianship)
- Transfer of ownership of property or bank accounts, CD's.
- Gifts of cash, property, credit card usage

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## Capacity Reference

Mental Capacity  
Legal and Medical Aspects of  
Assessment and Treatment  
Second Edition—1994, annual  
supplements  
Arthur C. Walsh, Baird B. Brown,  
Kathryn Kaye and James Grigsby

\*Legal Capacity Questionnaire

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## Denial of Critical Care

The deprivation of minimum food, shelter, clothing, supervision, physical or mental health care, or other care necessary to maintain a dependent adult's life or health, as a result of the willful or negligent acts or omission of a caretaker or self.

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## Denial of Critical Care includes:

- Denial of or failure to provide food, shelter, adequate clothing, adequate medical care, adequate mental health care, adequate physical care, or proper supervision
- Denial of or failure to meet emotional needs necessary for normal functioning

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## Sexual Exploitation

Of a dependent adult who is a resident of a health care facility by a caretaker providing services to or employed by the health care facility.

Any consensual or nonconsensual sexual conduct with a dependent adult for the purpose of arousing or satisfying the sexual desires of the caretaker or dependent adult. Does not include touching which is part of an examination, treatment or care by a caretaker acting within the scope of employment

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## Dependent Adult Abuse Does Not Include:

- Declines medical treatment if the dependent adult holds a belief or is of a religion whose practices call for reliance on spiritual means in place of medical treatment.
- Withholding or withdrawing of health care from a dependent adult who is terminally ill upon the adult's or next of kin request
- Domestic abuse situations where the victim is not dependent
- Those persons legally incarcerated in a penal setting

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## Who is a Caretaker?

Means a related or non-related person who has the responsibility for the protection, care or custody of a dependent adult as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court.

235B.2

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**Who is required to report?**

- A social worker/income maintenance
- A certified psychologist
- A member of the staff of a community mental health center
- Staff of a hospital
- Staff or employee of a public or private health care facility (135C.1)
- A peace officer

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**Mandatory reporters...**

- An in-home homemaker-home health aide
- A health practitioner—232.68
- Staff of a community supervised apartment living arrangement, sheltered workshop or work activity center
- A person who performs inspections of elder group homes for Elder Affairs and a resident advocate committee member
- A person, who in the course of employment, examines, attends, counsels or treats a dependent adult and reasonably believes the dependent adult has suffered abuse.

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**Immunity from Liability**

Any mandatory reporter acting in good faith when making a report of suspected dependent adult abuse is immune from any liability, civil or criminal, which might otherwise be incurred or imposed.

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## Sanctions for non-reporting

1. Any mandatory reporter who knowingly and willfully fails to report suspected dependent adult abuse is guilty of a simple misdemeanor. (30 days, \$100 fine)
2. Can be civilly liable for damages caused for that failure to report.
3. Any mandatory reporter who knowingly reports false information about abuse is guilty of a simple misdemeanor.

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## Reporting Procedures

- Oral reports are to be made immediately, by phone or in person
- Written report shall be made within 48 hours after an oral report. Form number 470-2441
- Oral report to appropriate law enforcement if believe immediate protection is needed
- Reporting information is now available online at [www.dhs.state.ia.us](http://www.dhs.state.ia.us)

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## Reports should include:

1. The names and addresses of the dependent adult, appropriate relatives, caretakers and other persons believed to be responsible for care
2. The dependent adult's present location
3. The reason the adult is believed to be dependent
4. The dependent adult's age

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### Reports should include:

5. The nature and extent of the abuse, including information about previous abuse
6. Information concerning other dependent adults in the residence
7. Other information which might help establish the cause of the abuse and the identity of the person responsible or in providing assistance to the adult
8. Name and address of person making the report. (Can be confidential)

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### Report Conclusions

1. *Founded*—A preponderance (more than 50%) of evidence that the allegations are true.
2. *Unfounded*—A preponderance (more than 50%) of evidence that the allegations are not true or insufficient evidence to conclude allegations are true or absence of one of the factors necessary to report
3. *Undetermined*—All the evidence has been collected and there is not a preponderance (more than 50%) of evidence to conclude whether the allegations are founded or unfounded.

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### Reviews and Appeals

Any subject of a report may request a correction to the report. The subject has 6 months from the date of notification to request review, correction or expungement by the Registry.

Process:

1. Registry review
2. Administrative appeal
3. Review through the court system

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## Review Request

Send in writing, dated and signed by the subject to

Central Abuse Registry  
Attn: Registry Review  
Iowa Department of Human Services  
Hoover Building  
Des Moines IA 50319-0114

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## Preventions

- Services and support through the aging network for persons 60 years of age or older

1-800-532-3213

- Nursing home report cards

[www.dia-hfd.state.ia.us/reportcards](http://www.dia-hfd.state.ia.us/reportcards)

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## Interventions

- Self-determination—voluntarily accept services or to decline/refuse services
- If victim of criminal act, involve law enforcement
  - Neglect or abandonment 726.3
  - Wanton neglect 726.8(1)
  - Nonsupport of dep. Adult 726.8(2)
  - Assault 708
  - Sexual Abuse 709
  - Dependent Adult Abuse 235B.20

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## Other Interventions

1. Power of Attorney-capacity
2. Protective/restraining orders
3. Money Management Services—  
Representative Payee or Bill Payer
4. Federal agency which administers the  
benefit check. I.e. SSA, VA
5. Direct Deposit or withdrawals
6. Long-Term Care Ombudsman  
800-532-3213

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## Other Interventions

7. Crime Victim Assistance Program-  
800- 373-5044
8. Domestic abuse 800-942-0333
9. Licensing boards of professionals
10. Fraud-Medicare or Medicaid  
Medicare: 800-423-2449 or  
Medicaid Fraud Control Bureau:  
515-281-4115 (patient's abuse or neglect  
complaints in facilities receiving funds.)

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## Interventions

- DHS can involve the court to intervene  
on behalf of the dependent adult.  
There are four such interventions
1. Substance Abuse commitment-125
  2. Mental health commitment-229
  3. Guardianship 633.552
  4. Conservatorship 633.566

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## DCI Elder Crimes Unit

Alan D. Scholle—  
111 Ellen Street, Cedar Falls, IA 50613  
319-277-4601

Don K. Shreffler—  
2025 Hunt Avenue, Council Bluffs 51503  
712-322-1585

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