




Aging in Florida: Elder Financial Abuse & Probate

with
Karen Michaels, VP

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What is Financial Abuse of the Elderly?

Per the CFPB, Elder Financial Abuse “refers to a broad range of behaviors, including taking money or property, forging an older person’s signature, coercing or unduly influencing an older person to sign a financial document and defrauding or scamming money from an older person.”

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Stories of Elder Abuse

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- The National Council on Aging estimates one in 10 adults aged 60 and older have experienced elder abuse in some form.

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Factors Contributing to Financial Abuse

- High % of seniors live alone and may be more vulnerable to scams
- Seniors may believe the “pitches” they hear, have trouble spotting fraud.
- Population of seniors increasing
- Seniors have high net worth

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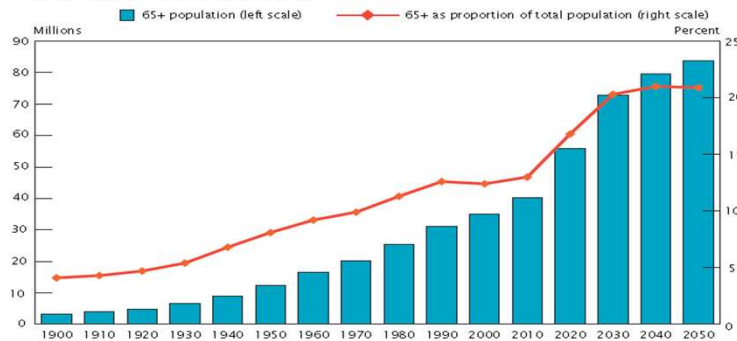
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Population Stats

Population Aged 65 and Over: 1900 to 2050

(For information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2010/doc/sf1.pdf)



Sources: 1900 to 1940, and 1960 to 1980, U.S. Bureau of the Census, 1983; 1950, U.S. Bureau of the Census, 1953; 1990, U.S. Bureau of the Census, 1992; 2000, U.S. Census Bureau, 2001; 2010, U.S. Census Bureau, 2011; 2020 to 2050, U.S. Census Bureau, 2012a; 1900 to 2010, decennial census; 2020 to 2050, 2012 National Population Projections, Middle series.

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Factors Contributing to Financial Abuse

- **MONEY:**
 - Almost 80% own their own home
 - 41-68% with no mortgage
 - Over 50 = 70% of U.S. private wealth
 - 90% receive social security
 - Pensions

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Factors Contributing to Financial Abuse

- **Being Unprepared:**
 - Not ready for the potential loss of decision-making capacity
 - Are cognitively impaired with diminished ability to make financial decisions or detect a fraud or scam

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Factors Contributing to Financial Abuse

- Being Dependent:
 - Dependent on family member or caregiver to remain independent
 - Reluctant to report exploitation by family member or caregiver
 - Willful ignorance
 - Fear

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Baby Boomers Booming

- CA has largest # of elderly, but FL has country's greatest percentage of individuals over 65 (19%)
- Per U.S. Census Bureau, elderly population will double to approx. 75 million by 2030 or 1/5 of total U.S. population

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Wealthy Targets

- In 2011, net worth of households headed by a consumer 65 or older was \$17.2 trillion.
- This amount is set to increase to over \$60 trillion in next few decades.
- According to True Link Financial, estimated losses from elder abuse range from \$2.9 billion to \$36.9 billion per year.
 - Seniors don't report or abuse goes undetected

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Vulnerable Adult

- Under F.S. §415.102(29), a "vulnerable adult" means a person 18 years or older "whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging."
- The standard for being vulnerable is not the same as competency, and no finding of incompetency is necessary in order to prove that a person is vulnerable.

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Vulnerability Red Flags

- Isolation
- Cognitive decline
- Physical Disability
- Health problems
- Recent loss of their partner

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Exploitation

- F.S. Chapter 825: Abuse, Neglect and Exploitation of Elderly Persons and Disabled Adults:
825.103 Exploitation of an elderly person or disabled adult; penalties.—(1) “Exploitation of an elderly person or disabled adult” means:
(a) Knowingly obtaining or using, or endeavoring to obtain or use, an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:
 1. Stands in a position of trust and confidence with the elderly person or disabled adult;
or
 2. Has a business relationship with the elderly person or disabled adult
- Exploitation is a FELONY!

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Breach of Fiduciary Duty

- In the state of Florida, any breach of fiduciary duty takes place if the guardian or agent isn't acting in the best interests of the elderly individual.
- To prove there was a breach by the fiduciary or someone else, one or more of the following must be proven:
 - Extensive withdrawal from monetary accounts
 - Increased or changed spending habits
 - Someone added to the senior's financial accounts
 - Unpaid health care costs or no health care
 - Changes in the senior's estate
 - Changes in the senior's personality
 - Payments or gifts that seem excessive

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3 Main Abusers

Per National Adult Protective Services, there are 3 main categories of abusers targeting the elderly:

1. Family members – adult children and grandchildren (60%)
2. Professional Criminals – home repair scammers and telemarketers
3. Friends or others in position of trust – attorneys, bank employees, caretakers, pastors

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Common Forms of Financial Exploitation

- Changing the names on bank accounts
- Cash withdrawals
- Changing Beneficiaries
- POAs
- Deed Theft
- Foreclosure Rescue Scams

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Powers of Attorney

- POAs can be powerful documents which give a lot of authority to someone to make legal and financial decisions.
- Types of POAs: General, Specific, Durable
- Investigate: What's the relationship between the agent and the senior? Are there signs of mental incapacity or confusion? Is this transaction benefitting the senior or the agent?

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Powers of Attorney, contd.

Things to lookout for:

- Documents stating the onset of a senior's incapacity prior to signing POA
- Agent's decisions do not seem to be in the senior's best interests.

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Deed Theft

- Deed thefts are the transfer of property to another person, in which that person gains legal right to the property.
- Quit Claim Deed
- Signs for possible deed theft:
 - Mental confusion predating signing of the deed
 - Suspicion the senior was defrauded or coerced
 - No notary present at deed signing

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Foreclosure Rescue Scams

- Trick senior homeowners out of their money by promising to help with their mortgage payments.
- Scammer contacts the distressed homeowner, makes an offer to save the home from foreclosure for a fee.
- Scammer drains as much money out of victim as possible
- Or, scammer has property handed over to them by having owner sign for a "new" loan.

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Financial Abuse in Real Estate Red Flags

- Never get to speak directly with the elder person involved in the transaction
- The appearance of disorientation or lack of understanding
- The person seems unaware of dates and times
- The person seems to lack understanding of what the transaction is all about

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Red Flags, contd.

- Recent, uninsured deeds in the chain of title
- Change in contact person or other authorized user
- Elder borrower not allowed to speak for him or herself
- No documentation to support third-party's authority

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Red Flags, contd.

- Use of powers of attorney or change in grant of POA
- Documents signed outside of closing
- Sales or loan proceeds paid over to somebody other than the borrower or seller
- Holder of POA wants funds disbursed to him/herself

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Reporting Elder Abuse

- Florida Law requires that any person who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the:

Florida Abuse Hotline 1-800-96-ABUSE (1-800-962-2873)

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Reporting Elder Abuse

Department of Justice

<https://www.justice.gov/elderjustice/roadmap>

<https://www.justice.gov/elderjustice/senior-scam-alert>

The Department of Justice has an [interactive tool](#) for elders who have been financially exploited to help determine to which agency they should report their incident, and also a [senior scam alert](#) website.

Federal Bureau of Investigation's Internet Crime Complaint Center

<https://www.ic3.gov/>

The Federal Bureau of Investigation's Internet Crime Complaint Center receives complaints at this [website](#) or by calling 1-800-225-5324.

Federal Trade Commission

<https://www.ftccomplaintassistant.gov/>

The Federal Trade Commission has a [website](#) and a phone number (1-877-382-4357) where victims can file complaints that then are made available to law enforcement.

Administration for Community Living

<https://eldercare.acl.gov/Public/Index.aspx>

The Administration for Community Living, part of the Department of Health and Human Services, has an [excellent resource](#) for finding services specifically for elders and their families.

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Reporting Elder Abuse

Consumer Financial Protection Bureau

<https://www.consumerfinance.gov/practitioner-resources/resources-for-older-adults/protecting-against-fraud/>

The Consumer Financial Protection Bureau website has a lot of information on how to protect older adults from fraud and financial exploitation on its website.

CFPB's Office for Older Americans

Email us:

OlderAmericans@cfpb.gov

Find resources and mailing list:

[consumerfinance.gov/practitioner-resources/resources-for-older-adults/](https://www.consumerfinance.gov/practitioner-resources/resources-for-older-adults/)



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Scam Alerts

- More information on the latest scams and resources for people to protect themselves can be found online at <https://www.consumer.ftc.gov/features/scam-alerts>.

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PROBATE & REAL ESTATE

with **Karen Michaels, VP**

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What is Probate?

Probate is the legal process wherein the estate of a decedent is administered.

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Why Probate?

Law does not legally recognize heirs or beneficiaries unless probate is filed.

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Types of Probate

1. **Formal Probate** (FL Stat. Sect. 731-733) – testate or intestate; resident or not; personal representative appointed
2. **Summary Administration** (FL Stat. Sect. 735) – resident or not
May be filed only if:
 1. the Decedent has been dead for more than 2 years, **or**
 2. the value of the probate estate is less than \$75,000.00
3. **Ancillary Administration** (FL Stat. Sect. 734) – non-resident only

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Determining if Probate is Necessary

Items for review:

- How the Decedent held title to the property
- The nature of the property at the time of the Decedent's death (investment property, homestead property, etc.)

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Interests in Property & Probate

- Most interests in real property automatically vest at the time of death of the decedent.
- Sometimes, probate is needed to determine to whom the interest in real property passes.

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Subject to Probate

- Sole Tenancy
- Tenants in Common
- If either of these are true one of the probate proceedings as described above will be necessary.

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Not Subject to Probate

- Tenancy by the Entirety
 - When a husband and wife purchase a property together, spouse immediately inherits that property at the moment the other spouse dies.
- Joint Tenancy with Rights of Survivorship
 - When 2 or more people own equal amounts of the same property, applies to all kinds of relationships.
- Lady Bird Deeds and other Life Estates
 - Says that you own a real estate property for life and that you wish to give it to a specific person when you pass on.

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Is the Property in a Trust?

What kind of trust?

- Intervivos trust - a written agreement that takes effect during the lifetime of the settlor and can be revocable or irrevocable.
- Testamentary trust - created by a will and takes effect only upon the death of the settlor. – must be admitted to probate.

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Revocable Trusts (Living Trust)

- Assets remain in the grantor's estate.
- Provisions can be altered or canceled by the grantor.
- During the life of the trust, income earned is distributed to the grantor, and only after death do assets transfer to the beneficiaries.

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Irrevocable Trusts

- Can't be modified, amended or terminated without the beneficiary's permission.
- After transferring assets into the trust, the grantor can not change the written terms after it's been executed, thus removing all of his rights of ownership to those listed assets.

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Homestead Rules

Florida Constitution Article X, Section 4(c), Homestead: "The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child."

If an owner of an interest in homestead is survived by a minor child, the homestead cannot be devised.

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Rules, contd.

Section 732.401, Florida Statutes (Descent of Homestead):

- "(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent's death per stirpes."

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Rules – Minor Child

- If decedent survived by any minor child(ren), any devise of homestead to anyone, including minor child(ren), will fail.
- Homestead then goes through intestate statute.

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Protected vs Non-Protected

Protected Homestead

- Homestead that passes to the protected class, exempt from the claims of creditors, which is not an asset of the estate and is not subject to conveyance by the personal representative.

Non-Protected Homestead

- Homestead that passes subject to the claims of creditors, that is an asset of the probate estate, and is subject to conveyance by the personal representative. In effect, it has lost its protected status.

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How Do We Know If Its Homestead?

Issues may arise where the decedent owned more than one piece of property in Florida.

How to tell if it's homestead:

- Homestead tax exemption
- If the property was listed as the last residence on the death certificate, or
- If the property was listed as the last residence on the petition for administration.

If you do not have enough reliable information to make a determination as to whether or not the property constituted homestead, or if you have conflicting information, you will have to obtain an Order Determining Homestead from the Probate Court.

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Impact of the Order Determining Homestead on Vesting

The order determining homestead accomplishes several things:

- confirming the property is exempt from the claims of creditors
- that the property is not an asset of the estate and is not subject to conveyance by the personal representative

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Waiver of Homestead

- Rights of a surviving spouse to homestead property may be waived, wholly or partly, before or after marriage, by a written agreement signed by the waiving party in the presence of two subscribing witnesses.
- Each spouse must make a fair disclosure to the other of that spouse's estate, if the agreement or waiver is executed after marriage. No disclosure requirement exists for an agreement or waiver executed before marriage.

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Homestead & Trusts

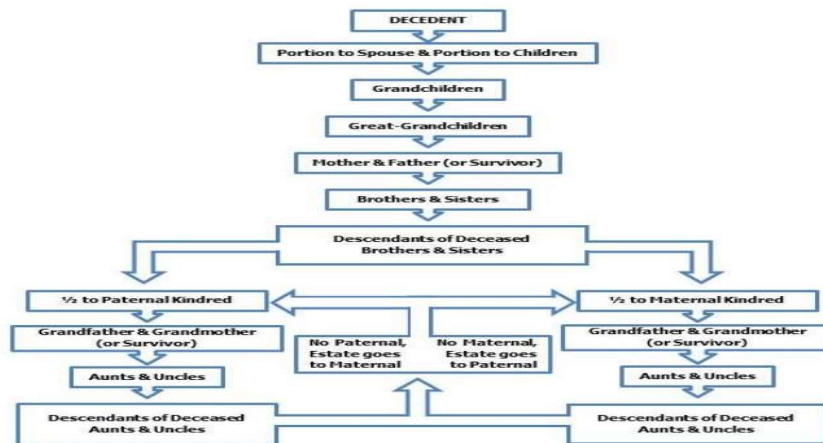
- Cannot avoid homestead laws by placing homestead property in a revocable trust. Irrevocable trusts?
- If only survived by a spouse, and the trust distributes the homestead property to the spouse in fee simple, the trust devise is valid.
- If the homestead is not distributed to the spouse OR, if the settlor is survived by one or more minor children, then, the trust devise of homestead violates the Florida constitution.
- If the trust devise violates the constitution's homestead rule, then title passes according to the Florida laws of intestacy.
- Probate proceedings may be necessary to determine the decedent's heirs.

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The Heirs



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Conveyances

- If the property is homestead and the decedent has properly devised it to his heirs at law, then the heirs at law must execute the deed(s).
- If the property is not homestead AND the will contains the power to sell/convey the property, then the Personal Representative may convey the property.
- If the will does not give the Personal Representative the power to sell/convey the property, then he or she needs to get a court order authorizing the sale.

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Power of Attorney

- Terminates upon Death!

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Judgments and Liens after Death

- Money judgments – judgment holder becomes general creditor and must file a claim with the probate estate
- Federal Income Tax Liens – remains a lien unless released
- Tax and Code Enforcement Liens – survives probate and must be paid
- Condo/HOA Liens – survives probate and must be paid
- Mortgages – Due upon Death

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What We Need From You

Items your title agent needs to close:

- Original Death Certificate
- Probate information
- Copy of sections of Trust confirming Successor Trustee (if applicable)

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