



THE FLORIDA STATE UNIVERSITY

COLLEGE of LAW

Claude Pepper Elder Law Clinic

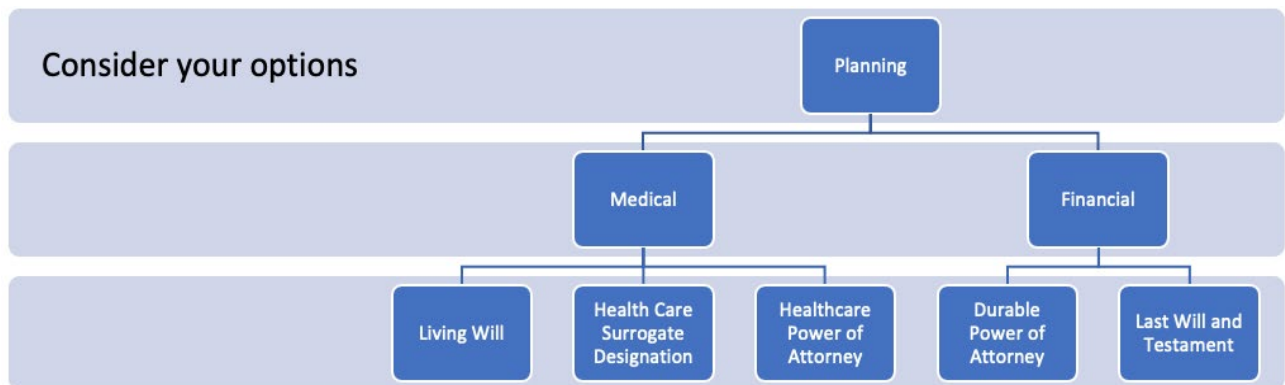
What Documents Do I Need?

Legal documents called **advance directives** enable you to document your preferences regarding treatment and care, including end-of-life wishes, and to talk with your family and your doctor about your preferences for end-of-life care.

Your family won't have to guess what decisions you would have made if you sign advance directives. These documents include:

- **Living Will.** This document describes to doctors and family members what medical treatment and procedures you would and would not prefer at the end of your life. (Fla. Stat. § 765.301 to Fla. Stat. § 765.309)
 - The suggested form for the living will is referenced by Fla. Stat. § 765.303
- **Health Care Surrogate Designation.** This document lets you appoint a person to make healthcare decisions on your behalf and to access your health information in the event you are unable to do so. It becomes effective immediately. Typically, this document is what is followed, unless the Health Care Power of Attorney was made more recently. (Fla. Stat. § 765.201 to Fla. Stat. § 765.205)
- **Durable Power of Attorney.** This document allows you to pick a person to act in your place and grant special decision making powers to. Both you and the person you choose will be able to make decisions during your lifetime. The person can also make decisions on your behalf in the event you are unable to do so. (Fla. Stat. § 709.2101 to Fla. Stat. § 709.2402)
 - The person you choose, your “agent”, can handle various activities for you including
 - Banking (opening bank accounts and transferring assets)
 - Taxes (filing taxes on your behalf)
 - Trusts (creating trusts on your behalf)
 - Handling Investments
 - Buying and selling property

- Recognition from Third Parties
 - A Durable Power of Attorney must be
 - Notarized by someone unrelated to you
 - Signed by you
 - Signed by two witnesses
- **Healthcare power of attorney.** This document can be included in the durable power of attorney to name a person you choose to make healthcare related decisions on your behalf in the event you are unable to do so.
- **Last Will and Testament.** This document helps you to express who you would like to receive your assets after you have passed away. (Fla. Stat. § 732.502(1))

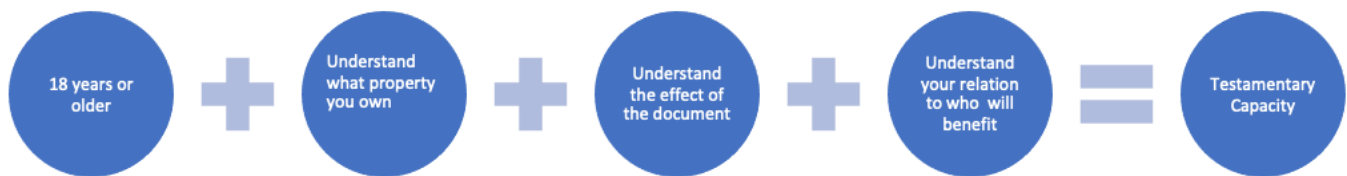


Different Levels of Capacity

There is a legal presumption of capacity for all adults. **Capacity** generally is a determination whether a person is able to make informed choices and decisions about their life.

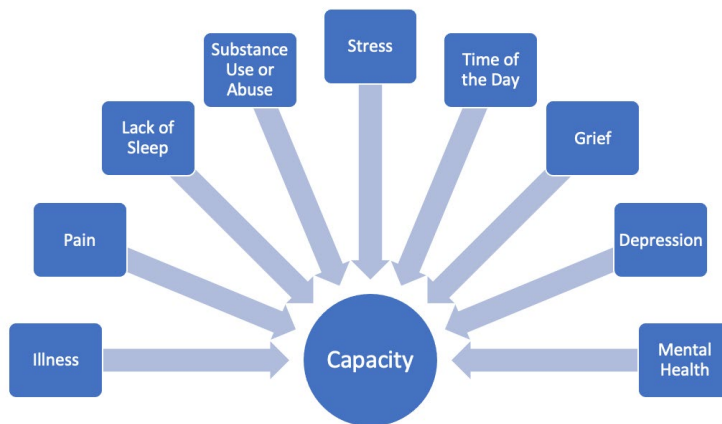
Capacity can be **transient**, meaning that it can come and go and vary in how much capacity a person has. It can also be **situational** as someone may have the capacity to make certain decisions but not others. Capacity can also occur on a **spectrum** ranging from comatose to full capacity.

A person must have **testamentary capacity** to make, amend, or revoke a will or trust. To have testamentary capacity a person must be at least 18 years old and of “sound mind”. Sound mind is defined as understanding what property they own and are referring to in the document, the effect of the document will be when it is signed or executed, and their relation to who will benefit. This is determined when someone is executing the will or trust.



There are several factors that can affect a person’s capacity.

- **Illness, Depression, and Mental Health.** Certain symptoms of the illness, depression, and mental health may affect a person’s ability to make informed decisions at the time and communicate.
- **Pain.** Pain can also affect a person’s capacity. As the levels of pain fluctuate a person may have a harder time communicating their decisions and understanding their choices.
- **Lack of Sleep.** A lack of sleep can influence a person’s decision making ability and cognition.
- **Substance use or abuse.** The influence of alcohol, prescription medications, and other substances can influence and impair a person’s capacity.
- **Stress and Grief.** The influence of stress or grief can cause decisions to be rushed and a person to not act in their usual capacity.
- **Time of the day.** A person may be more lucid at a certain time of day. It is important to understand when a person would best be able to make important informed decisions and choices about their life.



These factors should be taken into consideration when determining a person’s ability to express their life choices, to assess the consequences of their decisions, and to make rational decisions. It is important to consider whether a person’s capacity is situational to determine when it would be best for them to make decisions rather than placing it in the hands of someone else when they still have capacity.

The levels of capacity are important when determining legal decision making ability. A person who does not have capacity may be placed into a guardianship, where a guardian would have the right to make decisions instead on behalf of the person. While a guardianship may be necessary in certain situations, it is good to explore less restrictive alternatives first. Your loved one may benefit more from a durable power of attorney, health care surrogate, or choose to utilize supported decision making.

For example, if an illness is impacting a loved one’s ability to make decisions temporarily. It may be best to include a person they trust as Power of Attorney so that they can carry out certain tasks for them while they are dealing with the illness. In this way, they will retain their decision-making ability and also have someone to help them. In the event they do become incapacitated they will have a named agent that they trust to make financial decisions and to carry out tasks in the manner in which they would prefer.

Rights of Nursing Home Residents

After your loved one has moved into a nursing home or long-term care facility, you may worry that they will lose certain rights or the ability to make choices on their own. And while some things may change, this is not the case.

Under **federal law**, nursing homes are required to:

- Treat residents with dignity and respect,
- Provide a safe, clean, and comfortable environment,
- Allow residents to make their own schedule and participate in activities of their own choosing,
- Allow residents to manage their own financial affairs and be given notice of new charges imposed against their resident funds,
- Allow residents to have immediate access to their family members and other visitors, and
- Provide residents with reasonable access to professionals (like lawyers) who a resident wishes to see.

In addition, nursing homes must comply with civil rights laws which prohibit discrimination based on race, natural origin, disability, age, or religion.

Nursing home residents also have rights relating to their **Medicare** and **Medicaid** benefits.

- A nursing home cannot require, or even request, that a resident:
 - (1) Waive their rights to receive Medicare or Medicaid, or
 - (2) Make assurances that they will not become eligible and use these benefits in the future.
- It is also improper for a facility to charge a resident for items or services that are provided under Medicare and Medicaid. This practice can result in a resident losing their benefits, and should be taken very seriously.

Discharge from a Nursing Home

In some cases, a nursing home may attempt to discharge a resident from the facility or move the resident to a different room against the resident's wishes. Depending on the circumstances, this can be **unlawful**. Nursing home residents have the right to choose where they reside, and a facility may not relocate a resident solely for the convenience of staff.

Federal law provides that a resident may be discharged for only the following reasons:

- (1) When a resident's welfare and needs cannot be met in their current facility,
- (2) When a resident's health has improved to the extent that long-term care is no longer needed,
- (3) When the resident's behavior endangers the safety of other residents or staff in the nursing home,
- (4) When a resident fails to make requisite payments, or to have Medicaid or Medicare pay, after a period of reasonable and appropriate notice from the nursing home, or
- (5) The facility itself ceases to operate.

The discharge process is initiated through a document called a Nursing Home Transfer and Discharge Notice, which must be issued at least 30 days prior to the intended transfer date. (Fla. Stat. § 400.0255)

If you suspect that a care facility has wrongfully discharged your loved one, you should seek assistance from your local **Long-Term Care Ombudsman** by calling (888) 831-0404. The ombudsmen are independent volunteers of the State, who are empowered to resolve disputes between nursing homes and their residents. An ombudsman will review the discharge notice and assess whether the nursing home has acted improperly.

As a final measure, residents have the right to appeal their discharge from a nursing home. To initiate this process, you should contact the Department of Children and Families **within 10 days** of receiving the discharge notice. While you have up to 90 days to request a hearing for an appeal, the nursing home may still transfer your loved one if this is done after the first 10 days. When the request for appeal is submitted immediately, the nursing home cannot move your loved one until after a formal hearing and decision has been made.

- Contact the appeals office at:
Department of Children and Families
Office of Appeal Hearings
1317 Winewood Boulevard, Building 5
Tallahassee, FL 32399
(850) 488-1429

What is Financial Exploitation?

Financial exploitation is when someone intentionally attempts to obtain or deprive an adult 60 years of age or older of their funds, assets, or property. This can be done by someone who stands in a position of trust and confidence with an older adult, has a business relationship with them, or is breaching a fiduciary duty. (Fla. Stat. § 825.101-825.103)

A breach of fiduciary duty can occur when an older adult's guardian, trustee, or agent commits fraud, mismanages assets, abuses their powers, or acts against the best interest of the older adult.



Forms of Scams used for Exploitation

Financial

- **Mail-in Scams.** These can include lottery and sweepstakes scams to obtain personal information or to defraud someone.
- **False Information.** Exploiters may spread false information about investments and annuities, and misleading information about Reverse Mortgages
- **False Identity.** These can include calls from someone pretending to be a representative from the Social Security Administration, the IRS, Medicare, utility companies, other government agencies, or a prominent tech company.
- **Email Phishing.** These scams can involve emails sent to get people to reveal sensitive or personal information. The emails often have poor grammar, strange links or attachments, come from someone you do not know, and the information seems inconsistent.
- **Facebook/Social Media.** These scams can involve fake accounts with less than 50 followers ask for personal information, has poor grammar, includes links, and includes information that is too good to be true. Some social media scams ask you to “verify your account” in an attempt to steal your account and information.
- **Telemarketing and Phone Scams.** Can include calls about family members in peril and fake companies giving sales calls, or fake charity organizations

Scams are often extreme and unsolicited coming from an unknown phone number, email address, or letter. Scammers often threaten and attempt to isolate their target by encouraging them to cut off contact and not tell anyone what is going on. They also often increase pressure to pay or do something right away. Some scams rely on promises that are too good to be true, like a paid vacation or lottery win and require people to pay a “small amount” before they can achieve what they have won.

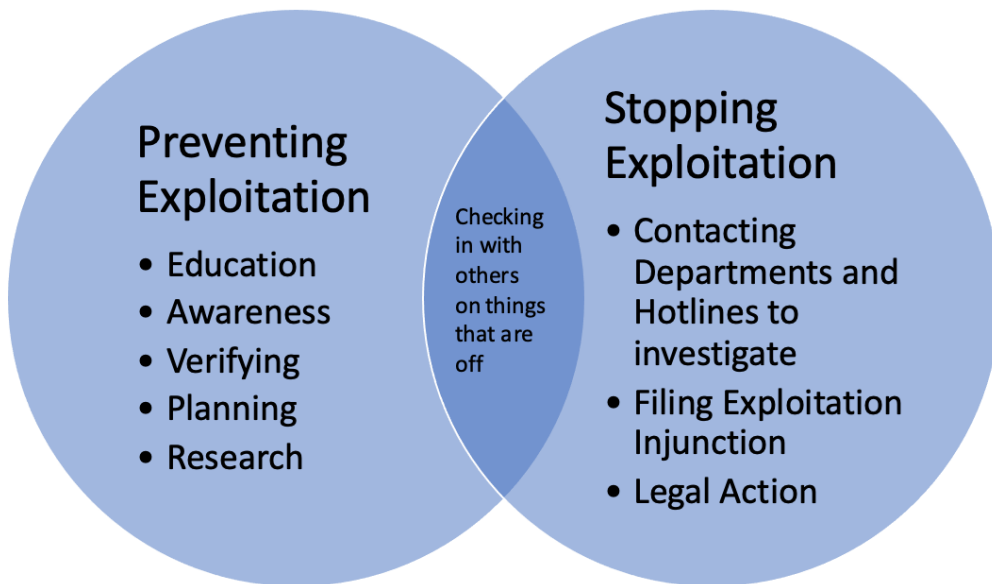
Older adults can be especially susceptible to exploitation due to potential cognitive decline, isolation, health problems, and physical disabilities.

How Can You Avoid Financial Exploitation?

It can be helpful for family members and friends to look into unexplained activity in an older person’s accounts. Large transfers, withdrawals, recurring transactions, unpaid bills, can all be indicators of suspicious activity. This can be especially suspicious if the older adult does not remember authorizing this activity on their account.

Financial exploitation can be avoided by

- Adding authorized users on accounts, or opening joint accounts, so that someone can help to monitor accounts
- Being careful with who you share your information with and being wary of sharing your social security number, bank account numbers, credit card numbers, and other personal information
- Checking in with family members and friends about things that seem off.
- Research websites and phone numbers to verify that they are legitimate and find the official number or website
- Filing a Financial Exploitation Injunction (Fla. Stat. § 825.1035)
 - A financial exploitation injunction can provide a temporary injunction for 15 days to freeze assets, stop contact, and restrain the exploiter from exploiting, among other forms of relief.
- Getting educated and being wary of misinformation around Reverse Mortgages, investment plans, lottery/sweepstakes, and identity theft
- Learning more about Financial Exploitation and how to prevent it through Operation S.A.F.E from the Florida Department of Financial Services through their video library and Be Scam Smart Resource Guide on their website myfloridacfo.com/safe



Resources for Financial Exploitation

- Florida Abuse Hotline 1-800-96-ABUSE (1-800-962-2873)
- Financial Exploitation Injunction (Fla. Stat. § 825.1035)
- Florida Department of Children and Families 1-800-962-2873
- Florida Department of Financial Services Operation S.A.F.E website
 - Operation Stop Adult Financial Exploitation is an outreach initiative from the Florida Department of Financial Services designed to protect Seniors in Florida from fraud and scams through education
- Office of Financial Protection for Older Americans
- AARP's scams and fraud page
- Florida Department of Agriculture and Consumer Services
- Florida Department of Elder Affairs
- Florida Office of Financial Regulation
- Social Security Administration website ssa.gov/scam/
- Consumer Financial Protection Bureau's Office of Financial Protection for Older Americans